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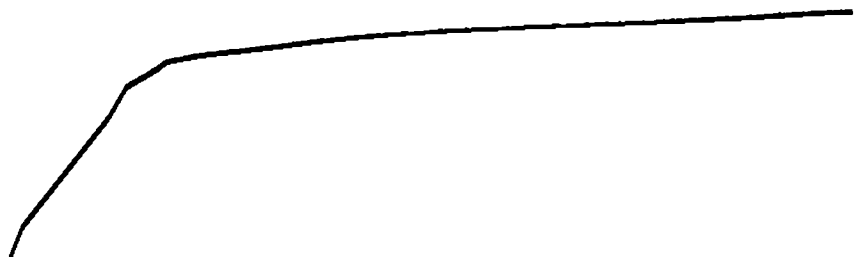
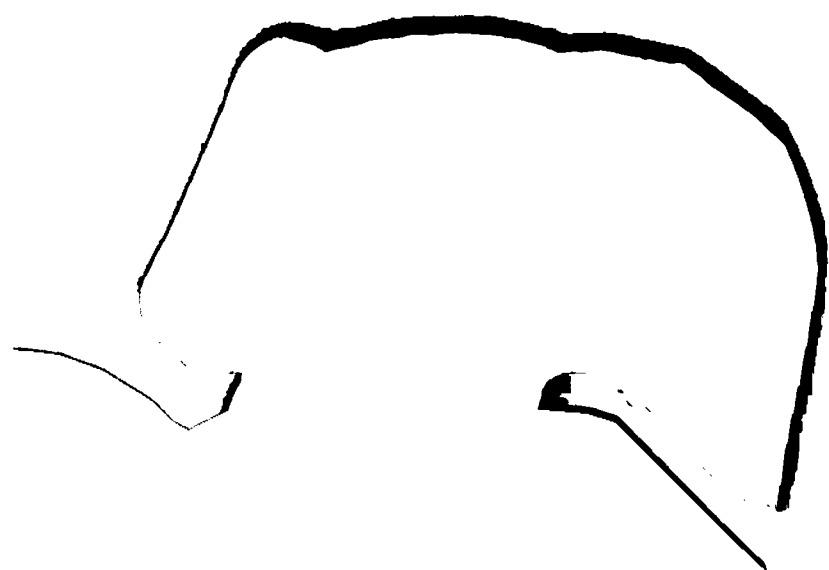
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AMERICAN
ELECTRICAL CASES
(CITED AM ELECTL. CAS.)

BEING

**A COLLECTION OF ALL THE IMPORTANT CASES (EXCEPT-
ING PATENT CASES) DECIDED IN THE STATE AND
FEDERAL COURTS OF THE UNITED STATES
FROM 1878 ON SUBJECTS RELATING TO**

**THE TELEGRAPH, THE TELEPHONE, ELECTRIC
LIGHT AND POWER, ELECTRIC RAILWAY,
AND ALL OTHER PRACTICAL USES
OF ELECTRICITY**

WITH ANNOTATIONS

EDITED BY
WILLIAM W. MORRILL,
Author of "Competency and Privilege of Witnesses," "City Negligence," etc.

VOLUME IV.
1892 - 1894.



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PREFACE.

THE one hundred and thirty-eight cases reported in full in this volume were decided between January 1, 1892, and April 1, 1894. They are arranged as in previous volumes, as nearly as practicable, by grouping those upon similar topics. Upon the subject of municipal control of street user by electrical companies, including the power to exact compensation for such user, there are nineteen cases; upon compulsory placing of wires underground, two cases; fifteen cases relate to the right of abutting land owners in respect to the use of highways for electrical purposes; two, to the maintenance of telegraph lines upon railroad rights of way; three, to the crossing of steam railroads by electric railways; six, to the interference of one user with another; fourteen, to negligence of electrical companies in the maintenance or operation of their apparatus, exclusive of electric street railway cases; two, to the status of electrical apparatus as property; two, to the proposition that the production of electric light is manufacture; one, to discrimination by telephone companies; one, to State regulation of telegraph rates; two to State and three to municipal taxation of telegraph companies; one each to the obstruction of navigable streams by electrical cables, the power of municipal corporations to engage in the business of electric lighting, and conversion of the wires of one electrical company by servants of another. The duties of telegraph companies to their patrons and the public, at common law or by statute, are considered in twenty-seven cases reported in full; while memoranda of a much larger number are contained in notes. A marked feature of this volume is the large number of electric railway accident cases, of which scarcely any are to be found in previous volumes. This volume contains fourteen cases where the injury was to passengers and twenty-two where it was to travelers using the streets.

In addition to the above, there are contained in notes memoranda of one hundred and thirty-six additional cases decided during the same period.

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AMERICAN ELECTRICAL CASES.

THE NORTH BALTIMORE PASSENGER RAILWAY COMPANY
V. THE NORTH AVENUE RAILWAY COMPANY.

Maryland Court of Appeals, Jan. 28, 1892.

(75 Md. 233.)

**ELECTRIC STREET RAILWAY.—MUNICIPAL CONTROL.—CONSTRUCTION OF
ORDINANCE.—INJUNCTION.**

The plaintiff's charter empowered it to maintain street railway lines in all streets which might be designated by the municipal authorities.

The ordinance designating a certain street for use by the plaintiff provided that if the city should thereafter grant any other company the privilege to operate a street railway in said street, it might permit such company to use plaintiff's track, upon making proper compensation.

The city council was by statute given general authority over the streets; also special authority to regulate their use for street railways.

Held, that under said ordinance the city council might authorize the use of plaintiff's track by an electric railway, although the use of electricity as a motive power was unknown when the ordinance was passed, and although some disturbance and injury to the plaintiff might result, since compensation was provided for.

Case of this series cited in opinion: *Koch v. North Ave. Ry. Co.*, *post*.

APPEAL by plaintiff, from order granting (in part only) application for temporary injunction. Facts stated in opinion.

Bernard Carter, for the appellant.

Francis K. Carey and *Fielder C. Slingluff* (with whom was *Julian I. Alexander* on the brief), for the appellee.

ALVEY, C. J., delivered the opinion of the court: The bill was filed in this case by the plaintiff, the present appellant, against the defendant, the appellee, both being street passenger railroad companies, for the purpose of obtaining an injunction against the defendant company to restrain this latter company from using the street railroad tracks of the plaintiff company, on North avenue, in the city of Baltimore, between McMechin street and Charles street, or from laying an inside and outside rail on the road of the plaintiff, as provided in ordinance No. 23, approved April 8, 1891.

The defendant company answered the bill, and proof was taken to be used at the hearing of the application for the injunction. A hearing was had upon bill, answer and proof; and the court, by its order of the 29th of October, 1891, granted an injunction to restrain the defendant company from laying rails for its track or tracks, on North avenue, inside the rails of the tracks of the plaintiff company; but the injunction prayed for was refused in all other respects. This appeal is taken only from that part of the order that refused the injunction as prayed; and therefore it presents no question on that part of the case covered by the injunction granted.

The plaintiff company was incorporated by the Act of 1872, ch. 369, as the Baltimore, Peabody Heights & Waverly Passenger Railroad; but by subsequent Act (that of 1880, ch. 488) the name was changed to that of the North Baltimore Passenger Railway Company. By the original act of incorporation it was provided that the corporation thereby created should be

Invested with all necessary power to lay down and construct, maintain, use, and operate passenger railways in the City of Baltimore, on all such streets or parts of streets as may be designated in any ordinance or ordinances which may be passed on the subject by the Mayor and City Council of Baltimore, and *upon such terms and subject to such conditions as may be made by such ordinance or ordinances*, and to receive and take such tolls, etc.

Before the passage of this act of incorporation, the

Mayor and City Council had, by ordinance passed on the 28th of March, 1872, given license or authority to certain individuals to construct passenger railroads on certain streets of the city, and, after the incorporation of the plaintiff company, the rights and authority conferred by the ordinance of the 28th of March, 1872, were assigned and transferred to the plaintiff company. After this assignment, the Mayor and City Council, by ordinance No. 74 of 1872, approved June 7th of that year, ratified the assignment to the plaintiff company; and, in addition to the powers conferred by the original ordinance, the city conferred power on the plaintiff company to lay its tracks on and use North avenue from John street to the corner of Charles street and North avenue. By the third section of this last mentioned ordinance the city made the following reservation :

If at any time hereafter the Mayor and City Council of Baltimore shall grant to any other road the right to lay railway tracks and run thereon city passenger cars on North avenue west from John street, they shall then have power to grant to such other road to run their cars upon the tracks of the Baltimore, Peabody Heights & Waverly Railroad [now the North Baltimore Company], on North avenue, between Charles and John streets, under such regulations, and upon the payment of such sum or sums of money to said Baltimore, Peabody Heights & Waverly Railroad, as shall be agreed upon and fixed by the Mayor, City Commissioner, and the president of said Baltimore, Peabody Heights & Waverly Railroad, or a majority of them.

It was under this last-mentioned ordinance of 1872, the reservation in which has just been recited, that the plaintiff company proceeded to construct and operate its road of double tracks on North avenue, between McMechin street on the west and Charles street on the east of Jones' falls; the rails of the plaintiff's road being laid on the bridge of the city constructed over the falls. This road has been, up to the present time, operated exclusively by horse power.

In May, 1889, the defendant company was incorporated under the general railroad incorporation law of this State

(Code, Art. 23); and by the certificate of incorporation of the company is declared to be incorporated

For the purpose of constructing and running a passenger railway in the City of Baltimore, the whole line of said road being located in said city, and the *termini* of said road being therein, etc.

In the certificate of incorporation there is nothing said as to the motive power intended to be employed, whether animal or mechanical; but by subsequent proceeding it appears that electricity was intended to be used as the motive power of the road. By the Act of the General Assembly of 1890, ch. 217, this charter of the defendant company was amended, the amendatory Act providing that the company should be authorized and empowered to consolidate with such other roads as it might cross or connect with, to aid such roads in construction, and to lease or purchase such road or roads.

Having been thus incorporated, and given additional powers by the amendatory Act of the Legislature, the defendant company obtained from the Mayor and City Council of Baltimore, ordinance No. 23 of 1891, approved April 8, 1891. By that ordinance the right is given the defendant company to

Lay down and construct double iron railway tracks, for the purpose of its business, beginning, for the extension of such double tracks, on North avenue at its intersection with the east side of McCulloch street, the present terminus of the tracks of said company, as heretofore authorized; and running thence on North avenue, eastwardly to Guilford avenue; and running thence on Guilford avenue and North street, southwardly, to the intersection of North street with Lexington street; and thence on Lexington street, westwardly, to Charles street; and on North street, southwardly, to the north side of Fayette street.

And by the third section of this ordinance it is declared that it shall be lawful for the defendant company to use the tracks now laid on North avenue by several named companies, among which is the plaintiff company,

In the manner and to the extent to which it is lawful for the Mayor and City Council to grant to the said North Avenue Railway Company the

Railway Co. v. Railway Co.

right to use said tracks ; and in any case in which the said railroads are entitled to the exclusive use of said tracks, and the said North Avenue Railway Company can not agree with them for the joint use of their said tracks, then it shall be lawful for the said North Avenue Railway Company to lay its rails inside and outside of said tracks of other roads ; provided that, if inside and outside rails are laid, the distance between its rails and the corresponding rails of the other railroads shall not be less than six inches nor more than two feet.

And then, in a distinct clause in the same section, is added this provision :

The right to run the cars of the North Avenue Railway Company on the tracks of the North Baltimore Passenger Railway Company (the plaintiff in this case) on North avenue, from Charles street to McMechin street, is hereby granted under the terms of ordinance No. 74, approved June 7, 1872 ; but nothing herein contained shall be construed to grant any right or privilege to the said North Avenue Railway Company to lay any additional tracks on North avenue bridge.

By the fourth section, authority is given the defendant company to propel its cars by electricity, supported from overhead wires, upon and over any part of its railway now constructed, or hereafter to be constructed, and to erect and maintain the necessary poles and wires for this purpose, upon complying with certain terms prescribed.

The Mayor and City Council of Baltimore are invested with full power and authority over the streets of the city, including North avenue, and all the streets and alleys of the city are declared to be public highways. Code Local Laws, Art. 4, §§ 806, 810, 814, 820. The General Assembly of 1890, by Act, ch. 370, for the purpose of conferring additional authority on the Mayor and City Council, provided

That they shall have power to regulate the *use of the streets, lanes and alleys in said city, by railway or other tracks, gas or other pipes, telegraph, telephone, electric light or other wires and poles, in, under, over, or upon the same, etc.*

We have referred thus fully to the special terms and provisions of the statutes and ordinances involved, for the

purpose of bringing them clearly in view, as upon their construction depends the decision of the principal questions presented on this appeal.

The plaintiff in its bill charges that the defendant threatens and is about to proceed to dig up the bed of the plaintiff's road on North avenue, and to lay rails thereon, inside and outside the tracks of the plaintiff, under the pretended authority derived from the ordinance of the 8th of April, 1891; that the defendant threatens and intends to tear up, move and render impassable for horse cars the said tracks of the plaintiff, whereby it will be prevented from exercising its franchise as a common carrier of passengers, and will suffer a great pecuniary loss in its business, incapable of definite ascertainment. It further charges that it has ground to believe that it is the purpose of the defendant, under the supposed authority relied on by it, to take up the railway tracks of the plaintiff as they are now laid and constructed along North avenue, from Charles street to McMechin street, and lay down in substitution therefor rails of a different character. The right to do the things charged as being contemplated and intended by the defendant, the plaintiff denies, and charges that the defendant has no right or power whatever to take up or interfere with, in any manner, the railway tracks of the plaintiff, or the structures on which they rest, nor to lay down any other rails or railway structure in lieu thereof.

The plaintiff also charges that the defendant company, by reason of a defect or omission in its certificate of incorporation, has acquired no power to construct the street railway projected by it; also that it is attempting to evade the express provisions of the statute law of the State by erecting on North street, a part of the route of the defendant, as defined in the ordinance, an elevated railway; and that it also proposes and intends to use electricity as a motive power for its cars, in violation of law.

On these allegations the prayer of the bill is that the defendant company be restrained and forever enjoined from

tearing up, removing, obstructing, or in any manner interfering with the railroad tracks of the plaintiff on North avenue, or any part of them, and from tearing up or digging in the bed of said avenue, between the plaintiff's road tracks thereon; and, generally, from in any manner hindering, obstructing, interfering with, or molesting the plaintiff in the use of its road, as now used and operated on said avenue.

The defendant company, by its answer, controverts and denies the exclusive right or claim set up by the plaintiff as against the defendant, and controverts the several grounds upon which the plaintiff relies for restraining the use by the defendant, of the plaintiff's road and road tracks on North avenue. It insists upon the validity of the ordinance of April 8th, 1891, and upon all the rights thereby granted to the company.

The testimony taken was to show in what manner, and to what extent, the road of the plaintiff would be affected in its value and operation by the use of the tracks or road bed, as is proposed to be done by the defendant.

The plaintiff, in support of its contention that the defendant should be enjoined as prayed, has insisted in argument :

1. That by the true construction of the ordinance of June 7, 1872, and of the ordinance of April 8, 1891, no valid right is granted to the defendant company to use the tracks or the road-bed of the plaintiff company on North avenue, for cars propelled by electricity.

2. That by reason of the omission specially to designate the places of *termini* in the certificate of incorporation of the defendant, that company acquired no corporate franchise or right to construct a railroad between the points named in the ordinance of the 8th of April, 1891, and that, therefore, the ordinance is void.

3. That the ordinance is void because it authorizes the construction by the defendant company, on a part of its route, of an elevated railroad, in utter disregard of express provision of the statute; and,

4. That the ordinance is void because it authorizes the defendant company to use electricity as a motive power of its cars, without warrant of law.

1. The first of these propositions is the principal one in this case, and it depends for its solution upon the principles of construction applicable to cases of delegated authority to municipal agents for public benefit, and upon principles of construction applicable in cases of grant of licenses or privileges by such agents, that may be set up in derogation of, or in restriction of public rights.

The plaintiff derived its chartered rights from the Legislature of the State; but that charter was subject to the provision, and, of course, was accepted subject to that provision, that the Mayor and City Council should exercise their discretion with respect to the streets and the terms and conditions to be prescribed by ordinance upon which the franchise should be enjoyed. This discretionary power vested in the Mayor and City Council was exercised in the passage of the ordinance of June 7, 1872. By that ordinance reservations were made, and those reservations were in the interest of the public. As trustees of the public, holding powers for and charged with duties to promote the interest of the public, such reservations were eminently proper to be made by the Mayor and City Council. It is not to be supposed that the Legislature, in granting the charter to the plaintiff company, in 1872, intended that the Mayor and City Council should, by ordinance passed in pursuance of that charter, grant away the control or in any way abdicate their power of supervision over such streets as they might designate as the route over which the plaintiff company might construct its road. The reservation was intended, manifestly, to prevent monopoly, and it is sufficiently broad to keep within the control of the city authorities the right to make available to the city and the public any improved mode of propelling car, that could be reasonably adapted to the tracks of the plaintiff's road without an additional incumbrance of the street. The language of the reservation is very com-

prehensive, and is without qualification. The authority reserved is to grant *to any other road* the right to lay tracks on North avenue, and that the Mayor and City Council shall have power to grant to *such other road* the right to run its cars upon the tracks of the plaintiff on North avenue *under such regulations* as shall be prescribed. This was the express condition upon which the plaintiff accepted the license or privilege of constructing its road on North avenue under the ordinance of the 7th of June, 1872. But it now insists that this unqualified reservation should be restrictively construed, and that as electricity was not used as a motive power on street cars at the time of this reservation made, its meaning should be declared to be that the right to grant to any other road the privilege of using the plaintiff's road tracks on North avenue is confined to such other road as shall use horse or animal power alone as the motive power of its cars. This construction we cannot adopt. It would not be in accordance with the established rules of construction applicable to cases like the present.

It is a well-settled principle that no implication will be indulged in derogation of the rights of the public, in the absence of express or plain terms of grant. An intention to grant an exclusive privilege or monopoly will not be implied, nor will a grant of privileges be given scope and effect, in restriction of public right, beyond what the plain words employed require. This is an established principle applicable in the construction of grants by the State, and it is equally applicable in the construction of grants of privileges by a municipal corporation, affecting public rights. *Omaha Horse Railway Company v. Cable Tramway Company of Omaha*, 30 Fed. Rep. 324; *Sioux City St. Railway Company v. Sioux City*, 138 U. S. 98, 107; Thompson's Law of Electricity, sec. 40, and cases therein referred to. The principle is well illustrated by the decision of the Supreme Court in the very recent case of *Slein v. Bienville Water Supply Company*, 141 U. S. 67. There it was claimed that a contractor had the exclusive right of

supplying water to the municipal corporation, but the claim to such exclusive right was not maintained ; and the Court held, among other propositions, that where a contract with a municipality is susceptible of two meanings, one restricting, the other extending, powers of the other party, that is to be adopted which works least harm to the municipality. In other words, where there is any want of a plainly expressed intention, the construction should be beneficial to the public. Here the language of the reservation is plain, and unless it be restricted as against public right, the contention of the plaintiff cannot be maintained.

Taking it, then, as being clear that the reserved power in the ordinance of June 7, 1872, is amply comprehensive to enable the Mayor and City Council to grant to the defendant company the right to use the tracks of the plaintiff company, on North avenue, with cars propelled by electricity, the question next presented is, is the manner of interference with and change in the structure of the plaintiff's railway tracks and road-bed, to adapt them to the use of the defendant's cars, within and justified by the terms of the reservation of the ordinance.

The power to the defendant company to use the tracks of the plaintiff is given by the ordinance of April 8, 1891, in the fullest manner in which the mayor and city council could confer it ; and, to make the grant of the privilege practical and useful to the defendant company, a right to make such necessary alterations and adaptations in the plaintiff's tracks and road-bed as may be reasonable and proper would seem to be but the dictate of reason. It is shown by the proof that the use of the same tracks by the two different motive powers is quite feasible. It is true, it may be difficult to determine, *a priori*, what may be the extent of interference required, or the extent of inconvenience and loss that may be suffered, by the alterations in the tracks proposed to be made. But that is not the question here, as the case is now presented. The main question is as to the extent of the power reserved to the city by the ordinance of the 7th of June, 1872. The plaintiff accepted

the privilege of making and operating its road on North avenue, under the ordinance, subject to an *unqualified power* reserved to the city, of granting the right to another company to use the tracks of the plaintiff when made. That right has been granted to the defendant company with the privilege of using electricity as a motive power. And, as we determine that such grant was fully authorized by the power reserved to the city, the grant of the right to use the tracks of the plaintiff must carry with it all such reasonable powers and incidents as may be necessary to make it effectual.

That there may be considerable amount of disturbance of the plaintiff's road, and the operations thereof, occasioned by the introduction of the defendant's cars thereon, moved by electrical power, is not unlikely to occur. But such change and disturbance are not to be allowed without just compensation to the plaintiff company. The ordinance of June 7, 1872, makes the provision that the cars of the defendant company can only run upon the plaintiff's tracks "*under such regulations, and upon the payment of such sum or sums of money*" to the plaintiff company, "*as shall be agreed upon and fixed* by the mayor, city commissioner and the president of the plaintiff company, *or a majority of them.*" And the ordinance of the 8th of April, 1891, grants the power of the use of the tracks by the defendant, under and according to the terms of ordinance No. 74, approved June 7, 1872. This, therefore, is the contract of the parties; and it must be conformed to as a condition precedent to the exercise of the right of the defendant to enter upon or use in any manner the tracks and property of the plaintiff. This provision of the ordinance is simply in accordance with the settled general rule of law upon the subject. 2 Dill. Mun. Corp., § 727; *Jersey City & Bergen Railroad Co. v. Jersey City & Hoboken Horse Railroad Co.*, 20 N. J. Eq. 61; and justice, as well as the principle of analogy to cases resting upon the power of eminent domain, require that the compensation should be ascertained and paid, if required.

before the property of the plaintiff is appropriated to the use of the defendant company. The injunction, therefore, should go to restrain the defendant company from any use or disturbance by it of the plaintiff's road tracks or road-bed on North avenue, between Charles and McMechin streets, until compensation is fixed and determined, and, if required, duly paid, as provided by the ordinance.

The other questions raised and presented in the brief and argument for the plaintiff — that in regard to the omission to define the *termini* in the certificate of incorporation of the defendant; that in regard to the alleged illegal construction of an elevated railroad on North street; and that in regard to the want of authority of the Mayor and City Council to confer the right on the defendant company to use electricity as a motive power in running its cars on the streets of Baltimore City — have all been considered and determined in the preceding case of *Koch et al. v. the North Avenue Railway Company*, 75 Md. 222. Suffice it to say here, the conclusion of the Court in respect to all those questions is adverse to the contention of the plaintiff, so far as the same can affect this case.

It follows that so much of the order of the Court below as has been appealed from by the plaintiff must be reversed, and the cause be remanded, that an injunction may issue in accordance with the forgoing opinion.

Order reversed in part and cause remanded.

NOTE.— See note to *St. Louis v. W. U. Tel. Co.* (second decision), *post*. Upon the question of construing an old ordinance or statute as embracing electricity, see cases cited in INDEX to vol. 3, at page 888.

See next case.

CANAL AND CLAIBORNE RAILROAD COMPANY V. CRESCENT CITY RAILROAD COMPANY AND ELECTRIC TRACTION AND MANUFACTURING COMPANY.

Louisiana Supreme Court, April 4, 1892.

(44 La. Ann. 485.)

ELECTRIC STREET RAILWAY.—MUNICIPAL CONTROL.—INJUNCTION.

(Head-note by the court):

The city government of New Orleans has the right to grant the privilege of the use of a part of the tracks of a street railway to another company. It can continue the use of a different car, propelled by a different motor than the one in use on the track.

The permission to use the electric motor is one of the means of using the public streets and is granted for the public convenience, and is the exercise of the police power of the city over public places.

A company desiring to use the roadbed and material in place of another company must first make compensation. But where an injunction is granted, without the prayer for compensation, before using the track, but a prohibition for the use of the track for any and all cars, it will be dissolved.

APPEAL by plaintiff below from judgment of Civil District Court, Parish of Orleans, denying application for injunction to restrain use of tracks of one electric railway company by another. Facts stated in opinion.

J. R. Beckwith and *F. P. Poche*, for plaintiff and appellant.

John M. Bonner and *Farrar, Jonas & Kruttschnitt*, for defendants and appellees.

The opinion of the court was delivered by McENERY, J.: The petition avers that the Canal & Claiborne Railroad Company is a corporation; that in the year 1887, the

Canal and Claiborne Streets Railroad company, another corporation, acquired from the city of New Orleans, for itself and its assigns, in due form, a lawful grant to own and operate a street railway for the term of 25 years on and over Canal street and the other streets described in the petition and in a copy of the grant annexed to the petition. The term of the grant commenced to run from the 8th of May, 1887. This grant was not only a legislative act of the city of New Orleans, but was in due form, and by due authority, embodied in a solemn contract by notarial act, made a part of the petition by copy. That during the month of July, 1888, for a valuable consideration, the plaintiff, by purchase, acquired an assignment of the grant, and from that date has been the full owner of all the rights and franchises contained in said grant, and still owns the same, having acquired all the rights of its vendor, the *Canal and Claiborne Streets* Railroad Company, the original grantee. Among other property so purchased and acquired is the track or railway on Canal street, running from the intersection of St. Charles street with Canal to the terminus at Wells street, near the river, and back by another track or railway, on the lower side of Canal street, to the intersection of Bourbon street with Canal street.

That the Crescent City Railroad Company is carrying on a street railway and operates two lines of railway, one commonly known as the Annunciation line, running through Tchoupitoulas, Annunciation, and other streets, having its lower terminus on Canal street, in the middle ground, near the intersection of Camp with Canal streets; and another line, which it claims to have acquired from some alleged grantee for a street railway, commencing at the junction of Camp and Prytania streets, running along the streets named in the petition, but coming back for its final or lower terminus to the point of commencement; that is, to the intersection of Camp and Prytania streets; and defendants claim that this grant, originally made to one Seymour and his associates, was by some subsequent action of the city authorities expanded so as to give the grantee and his assigns

a right to extend a line to Canal street. This line is known as the Coliseum line.

That after the Crescent City Railroad Company got possession of this supposed grant and its expansion, they commenced running cars on this Coliseum line over the line and tracks of plaintiff on Canal street, without its consent, and unlawfully, from the intersection of St. Charles street with the upper side of Canal street to Wells street, and back on the lower side of Canal street, on your petitioner's track, to the intersection of Bourbon street with Canal; that this act was unlawful, without the consent of plaintiff, and without any right or warrant of law; the first invasion of the tracks and rights of plaintiff was with mule or horse cars of the ordinary construction and weight.

That the right of action to demand indemnity or damages arising from this first invasion of plaintiff's rights by the use of said mule or horse cars is reserved in the petition. That, not contented with the wrong done by running its Coliseum cars over the track of plaintiff, defendants now attempt a further outrage and invasion of plaintiff's rights, and are engaged in constructing a new railway through Erato street, so planned as to connect the Annunciation street line, whose cars could not, without such junction, run over plaintiff's tracks, with the Coliseum street line, of which line the cars had the unlawful use of plaintiff's tracks, so that additional cars from the Annunciation line, that prior to said action could not reach plaintiff's line or tracks on Canal street, can be diverted from the Annunciation street line, taken through the Erato connecting link, and run over the Coliseum line, and thence on and over plaintiff's tracks on Canal street; that they threaten and intend to run many, if not all, of their Annunciation street cars through said Erato street connection over the Coliseum line over the Canal street tracks of plaintiff, increasing the number of cars running on plaintiff's track over the number formerly running from the Coliseum track over the plaintiff's line by at least 15 additional cars, making trips over

the lines at intervals not exceeding 10 or 15 minutes during the entire day.

That this is not the only wrong that is contemplated by the defendants, but that the Crescent City Railroad Company has entered into a combination with the other defendant, the Electric Traction & Manufacturing Company, by which the said Electric Traction & Manufacturing Company is to operate or provide the rolling stock for the Crescent City Railroad Company on its lines, to be propelled over plaintiff's track on Canal street. The new rolling stock to involve a change of motive power from car or mule propulsion to some form of electric propulsion by electric motor and storage batteries, with a construction giving the cars a weight of at least 8,000 pounds, independent of any passenger load. That the Electric Traction Company intend to stock the road with these heavy cars, and join the defendant railroad company in its assault upon the plaintiff's rights and property. That the railway of plaintiff on Canal street was constructed and designed in accordance with the specifications and obligations contained in its contract with the city for the use of cars propelled by mules or horses, of not over 3,800 pounds in weight, and is not constructed to bear the heavy rolling stock threatened to be put upon the structure, and is not adequate to bear and sustain a traffic carried on in cars of a character that without load weigh over four tons.

That the additional cars thrown on plaintiff's tracks by the Erato street connection from the Annunciation line will crowd petitioner's tracks on Canal street, so that, in the event that they do endure the additional cars and additional traffic without destruction, there will be practical eviction of plaintiff from the use of its own property in its tracks for its own legitimate use in the management and operation of its own lines for its own business.

The relief demanded is an injunction prohibiting the defendants from running any cars coming through the new roadway on Erato street, connecting the Annunciation street line with the Coliseum line, and from any unlawful

use, meddling, or interference with the plaintiff's line on Canal street by any additional cars running through Erato street from Annunciation street over the Coliseum line and over plaintiff's tracks, and from running any electric motor of heavy weight, and from meddling and interfering in any manner with plaintiff's rights in the complete dominion, control, and use of its street railway line and property on Canal street.

The Crescent City Railroad Company, after pleading the general issue, averred that all the matters and things set up in the petition relative to the rights of the plaintiff to that part of the track on Canal street, and relative to the right of the Crescent City Railroad Company to use the same, were in issue between said Canal & Claiborne Streets Railroad Company and this defendant in suit (*Claiborne Railroad Company v. Crescent City Railroad Company*), and that a final judgment has been rendered therein in favor of the Crescent City Railroad Company, and which final judgment was affirmed on appeal to the supreme court, and this defendant pleads said record and said judgment as *res adjudicata*, and makes the record of said suit a part of this answer for reference and proof.

That all that portion of the track on Canal street, claimed as being the exclusive property of the plaintiff, was originally constructed for a common trunk line, which all the railroads running cars on Canal street had the right to use under the conditions of the city ordinance providing for the construction of said trunk line, that the pretended new grant of 1887, set up by the plaintiff, was necessarily obtained subject to the conditions of the old grant, and *subject to the rights acquired* under the provisions of the old grant by the Crescent City Railroad Company in pursuance of certain ordinances from the city of New Orleans; and that, under the provisions of said old grant, and the right acquired from the city of New Orleans, the Crescent City Railroad Company is as much *the owner of said line, and has as great a right to run cars upon said line, as the*

Canal & Claiborne Railroad Company has ; the only obligation upon the Crescent City Railroad Company or the city of New Orleans being to reimburse to the plaintiff a fair and reasonable proportion of the value of the portion or portions of the road to be so used.

That the grant of 1887 was obtained from the city of New Orleans under the present charter, which provides that the council shall have power to compel all railways on any one street to run on and use one and the same track ; that the defendant has been lawfully and peaceably running its cars over the trunk tracks on Canal street since 1881, and that its right so to run its cars has been adjudged in the suit above set forth ; that this defendant has obtained permission from the city of New Orleans to use electricity in propelling its cars, and the plaintiff has no right to say what kind of cars, or what number of cars, or what weight of cars, this defendant, under authority from the city of New Orleans, shall run in the streets, over its own tracks, in accordance with its franchises.

That for more than a year it has operated one of said motor cars over said common track, without injury of any kind thereto ; that the ordinance No. 4348, approved March 17, 1890, is not a new grant to this defendant, but is simply a modification of a grant made in the year 1880, and not a substantial change thereof ; that, even if it were a new grant, it is clearly within the police power of the city of New Orleans over its streets ; that the defendant has constructed tracks through Erato street in accordance with the provisions of the ordinance approved March 17, 1890, and that it intends to run a portion of its Coliseum cars through the said street and over the Annunciation street tracks, and that it intends to run some of the Annunciation street cars through said connection, as the exigencies of travel and the requirements of business may demand ; and defendant says it clearly has the right so to do under its various grants from the city of New Orleans.

Judgment was rendered in favor of the defendants in

the lower court, and the plaintiff has brought the case here on appeal.

The right of the defendant to run cars belonging to the Coliseum & Upper Magazine line has already been definitively settled in the decree in the case of the *Canal & Claiborne Street Railroad Co. v. Crescent City Railroad Co.*, 41 An. 561. It is claimed, however, that the Crescent City Railroad Company is operating two lines of railroad, one known as the Annunciation Line, which was extended through certain streets, so as to bring its cars over plaintiff's track on Canal street, thus increasing the number of cars run by defendants over the track of plaintiff, which is recognized as a trunk line.

The defendants had the permission of the city government to run over this line and over plaintiff's track. It is immaterial to consider the question raised whether this was a new franchise, as the city had the undoubted authority to permit any company to use the track of plaintiff. 41 An. 561.

In the occupation and use of plaintiff's track there can be no interference with the right of the plaintiff to run its cars on schedule time, in accordance with its contract with the city. To permit this would be to practically evict plaintiff from the use of its road-bed, and in the management and operation of its business. There is no evidence, however, that such an eviction has taken place.

It appears from the record that the co-defendant, the Electric Traction & Manufacturing Co., placed its cars on the track of plaintiff, under the franchise enjoyed by the defendant, and in accordance with a contract entered into between them. They were manufacturers of a certain description of car, which the defendants placed on their line, and ran over plaintiff's track. That the track was originally constructed for horse cars, and was not strong enough to bear the weight of electric cars, is no reason why they should not be placed on the track. There are constant improvements in the mode of travel. New and improved conveyances are daily coming into use. Public

convenience and necessity require the adoption of the most improved methods. The streets belong to the public. Their use for the public cannot be abridged. Hence, when the municipal government in its discretion sees the necessity of permitting the use of the streets by improved cars, driven at greater speed by a new motor, no one can complain, as no franchise can be granted over a street exclusively to any one for the continued use of any particular kind of conveyance.

The electric motor is but one means of using the streets, and the permission to use the electric cars is established for the public convenience, and is the exercise of the police power of the city over its public places. It can not be questioned, unless, as stated above, its use evicts the company which owns the road-bed and material in place from its property.

The principle has been announced by this court that before one company can avail itself of the use of the road-bed and material in place of another, the road so desiring to enter upon the part of the track of another must first make compensation. *R. R. Co. v. Orleans R. R. Co.*, 44 An. This question is not presented in this case. The relief asked is an absolute prohibition to the putting of any and all cars on plaintiff's track by the defendant. The defendant has used the track of the plaintiff. It has its cars of the Annunciation line now on plaintiff's track. It is true the injunction was bonded, but there is no prayer in the petition that compensation be made to the plaintiff before use of its track. The relief is now one of damages.

Judgment affirmed, with reservation of the right of plaintiff to sue defendants for damages for use of its tracks.

NOTE.—See preceding case.

See note to *St. Louis v. W. U. Tel. Co.* (second decision), *post*.

NEWTON BUCKNER ET AL. V. JUDAH HART.

U. S. Circuit Court, Eastern District of Louisiana, November 18, 1892.

In Equity.

(52 Fed. Rep. 835.)

ELECTRIC STREET RAILWAY.—MUNICIPAL CONTROL.—CONSTRUCTION OF
STATUTE.

A statute authorizing municipal authorities to permit the maintenance of "horse and steam railroads," held, to commit to them the discretion to grant a street franchise to electric railways, the words "horse and steam" being intended as words of illustration rather than of limitation.

APPLICATION for injunction on *pendente lite* in action to restrain the construction of a trolley railway in front of premises of the complainant in the city of New Orleans.

H. H. Hall and *W. W. Howe*, for complainants.

Farrar, Jones & Kruttschnitt, for defendant.

BILLINGS, District Judge: This case is before the court upon an application for an injunction *pendente lite*, which has been heard on the bill and amended bill, and upon counter affidavits and exhibits.

The first question presented is as to the power of the common council to grant to the defendant the franchise to lay and operate upon any of the streets in the city of New Orleans a street railroad which shall be propelled by electricity after the trolley method or system. The council have granted such a franchise. Had it the authority to make such a grant? The answer to this question must be found in the present charter of the city of New Orleans (Act No. 20, 1882.) The provision on that subject is found

in the existing charter (Acts 1882, No. 20, p. 14.) Page 21, § 8, among other things, provides that the common council shall also

Have the power to authorize the use of the streets for horse and steam railroads, and to regulate the same; to require and compel all lines of railway or tramway in any one street to run on and to use one and the same track and turntable; to compel them to keep conductors on their cars, and compel all such companies to keep in repair the street bridges and crossings through or over which their cars run; to open and keep open and free from obstruction all streets, public squares, wharves, landings, lake shore and river and canal banks.

It has been argued by the solicitors for the complainants that, when the Legislature committed to the Common Council the power to authorize "horse and steam railroads," these words "horse and steam" were words of limitation, and that no power is given with reference to railroads propelled by other motive powers, and it has been urged by the solicitor for the defendant that these were words of illustration, and that the intention of the Legislature was to commit to the city government the authority to authorize street railroads, no matter what was the motive power. It is difficult to see any reason why the Legislature should not have committed to the common council the authority to grant in their discretion the use of railroads propelled by any other motive power as well as those propelled by the two specified. It seems to me they granted the discretion as to all street railroads, and mentioned only "horse and steam" railroads because, according to the then existing state, so to speak, of the art, horses and steam were the only means for the propulsion of street cars in use. Not to adopt this view would be to infer that the Legislature meant to exclude all other means of propulsion which the ever advancing spirit of invention might discover. Such a prohibition would much more naturally have been put in a positive, express form. The public good required that the common council should be at liberty to place at the service of

the public street railroads with all the valuable improvements in the means of propulsion which ingenuity and science should from time to time discover, the matter of public safety and public inconvenience being left to be considered by the common council. It is the duty of courts to interpret statutes in aid of their manifest object. So that so far as concerns the objections to the nature of the motive power and the method by which it is used, my opinion is that it ought not to be maintained. * * * *

NOTE.— In the above case, the injunction prayed for was granted, upon the ground, among others, that the City Council had sought to evade the provision of the charter which required the franchise to construct and maintain street railways to be awarded to the highest bidder at public auction. The court held that this meant the highest *cash* bidder ; whereas the City Council had bartered away the franchise for a certain amount of gravel to be placed on the streets.

An appeal was taken to the United States Circuit Court of Appeals (*Hart v. Buckner*, 54 Fed. Rep. 925), where the decree was confirmed.

See INDEX to this and preceding volume, title "Statutes construed."

See note to *St. Louis v. W. U. Tel. Co.* (second decision), *post*.

STACY REEVES ET AL. V. PHILADELPHIA TRACTION COMPANY ET AL., Appellants.

HOWARD WATKIN ET AL. V. WEST PHILADELPHIA PASSENGER RAILWAY COMPANY ET AL., Appellants.

WILLIAM H. HAINES ET AL. V. TWENTY-SECOND STREET AND ALLEGHENY AVENUE PASSENGER RAILWAY COMPANY ET AL., Appellants.

Pennsylvania Supreme Court, Jan. 3, 1893.

(152 Pa. St. 153.)

ELECTRIC STREET RAILWAY.—MUNICIPAL CONTROL.—CONSTRUCTION OF STATUTE AND ORDINANCE.—CONSTITUTIONAL LAW.

The Pennsylvania statute of 1876, which permits those operating passenger railways in cities of the first class to use other than animal power when authorized by municipal councils, is not unconstitutional as being local or special legislation.

It authorizes the use of the overhead trolley electrical system.

Held, also, that a municipal ordinance authorizing the erection and maintenance of appliances for such system by a lessor company, conferred such authority upon a lessee in exclusive control of the road, although not named in the ordinance.

APPEAL from decrees in three actions, granting preliminary injunctions to abutting owners to restrain maintenance of overhead trolley system.

Rufus E. Shapley and John G. Johnson, with them David W. Sellers, for appellant.

Richard C. Dale, John C. Bullitt, and Logan M. Bullitt with him, for appellee.

MITCHELL, J.: The questions presented by these cases are exclusively of law, and may be conveniently summed

up as, first, has the Legislature authorized the appellant companies to do the acts complained of, and, secondly, if so, has such authority become operative by the consent of the municipal councils, validly given?

It is conceded that no such authority is contained in the charter of the companies. But by the act of May 8, 1876, P. L. 147:

Passenger railways in any and all cities of the first class * * * may use other than animal power * * * whenever authorized so to do by the councils of such city, and the limitations contained in any of the charters of passenger railway companies, restricting them to the use of horse power, be, and the same are hereby repealed, provided, etc.

If this statute is constitutional, it supplies the necessary authority. It is claimed, however, that it transgresses the prohibition of article 3, section 7, of the Constitution, in that it is a local or special law amending or extending the charter of a corporation. But under the settled construction of this section, classification of subjects, including cities, is permissible, and legislation which applies alike to all the members of a class is not local or special, but general. The important inquiry, therefore, is whether the act of 1876 is upon a subject as to which the classification of cities is proper. Repeated decisions of this court have marked out the lines upon which such classification may proceed. It is not necessary to cite them all, but in one of the latest, *Wyoming Street*, 137 Pa. 494 (503), our Brother WILLIAMS has put the test into the compactest phrase: "The test, therefore, by which all laws may be tried, is their effect. If they operate upon the exercise of some power or duty of a municipality of the given class * * * they are general;" and he gives, as an example: "An act relating to the lighting of streets in cities of the third class would be a general law." The control of the vehicles that shall be used on the public streets for the general conveyance of passengers, the rate of speed, and the motive power by which they shall be propelled, is equally, or even more peculiarly, the subject of municipal duty. In fact,

public conveyances, whether ferry boats, barges, hackney coaches or omnibuses, have been subjects of police regulation and license as long as they have been known or used in Pennsylvania. The act of 1876 is therefore upon a subject proper for municipal classification, and is a general law. It takes off restrictions previously existing as to the motive power of cars upon streets, and commits the whole subject to the control of the cities themselves, acting through their councils. This is its effect, and that is the test of its constitutionality. That incidentally it has affected and enlarged the charters of certain railway corporations, does not vitiate it as an exercise of unquestionable police powers over subjects within their proper province. The second clause of the act, expressly repealing the charter restrictions to horse power as a motor, is not an essential part of its substance, and might have been omitted without impairing its general scope and effect. It was manifestly added to prevent any question of the application of the act to companies already chartered.

The learned court below thought itself bound by the decision in *Weinman v. Pass. Ry. Co.*, 118 Pa. 192, but there is a distinction between the cases that is capable of sharp definition. The statute involved in that case was one relating to the formation of corporations. In the language of the opinion: "The subject of this statute is street railway companies, which is a subject for general legislation; while the statute professes to deal only with a limited number of these railways, and these are selected by reference to their location in certain cities. Under the guise of a general law, we have here one which is special because it relates to a few members of the general class of corporations known as street railway companies; and local because its operations are confined to particular localities." The essence of that decision is that the formation of corporations, their corporate powers, capital stock, dividends, etc., have no relation to the classification of cities, and cannot be made in any way to depend thereon. The act of 1876, on the contrary, as we have seen, has nothing to do with

the formation, stock or dividends of passenger railway companies, but refers solely to the management of their cars on the public streets, a subject having close relation to the powers and duties of the municipal authorities to which the act commits its control.

An interesting and most important question, whether the grant of a right to build a passenger railway, or any similar franchise, does not carry with it, at least in the absence of specific limitations or prohibitions, the right from time to time to operate it by new methods and motive powers, developed in the progress of invention and experience, was earnestly argued by appellants, and the cases cited make a strong showing in favor of such view. We have already held in *Philadelphia v. Ridge Av. R. W. Co.*, 143 Pa. St. 444, 472, that, in the matter of repaving, "the company is bound to keep pace with the progress of the age in which it continues to exercise its corporate rights;" and the argument is that the measure of its duties must also be the measure of its rights. We do not, however, find it necessary to pass upon this question in the present case, and we refer to it only to avoid the possible implication that we deemed it untenable.

Coming, now, to the second question, whether the legislative grant has been made operative by the assent of councils, we find that, by ordinances of various dates in 1891 and 1892, consent to the erection of the needful appliances, and the operation of the roads by overhead electric wires, was given by councils to the Continental, the West Philadelphia, and the Twenty-second Street Railways, each specifically by name. The Philadelphia Traction Company was not named in any of the ordinances, and, as it alone had authority in its charter to use the electric system, the learned court below held the consent to be insufficient. As we have, however, held the act of 1876 to be constitutional, and as that act supplies the authority wanting in the charters, it might be enough to stop here, and rest the case upon that statute. But as another view leads to the same result, it will be well to present that also.

It appears in the answers, and is undisputed, that the Philadelphia Traction Company is the lessee for long terms of years of the three other companies defendant, and that each of them is operated exclusively by its lessee. In each case the two companies, lessor and lessee, are in the exclusive management and operation of the latter, which has all the powers and authority of the lessor, except the sole reserved franchise to be a corporation, and has, in addition, its own express and specific franchise to make contracts, and lease and operate roads, and furnish motive power. In their aspect to the public, as regards their powers and their duties, the two companies are as one, and in the doing of any specific thing, whether it should be done with the right hand or the left, is to the public immaterial. What the public interests are concerned with is the thing itself which is to be done, not the technical name of the corporation that is to do it; and when, therefore, the councils gave their consent to the operation of the electric system upon the streets occupied by these railway lines, the presumption is that it was the thing, more than the person, that occupied their attention. The scope of legislative acts, whether statutes or ordinances, is to be determined by the intention of the enacting body, and while that is to be sought in the language employed, yet, if the meaning is clear, it is not rendered ineffective by the use of inapt words. They may make the meaning more difficult to reach, but not the less paramount when ascertained. In the present case the thing to be done was the operation of the railways on the streets named by the overhead electric system, and the corporation by which in fact it was to be done was the Traction Company. Whether by virtue of its own powers, or by those of its lessor, was of no moment to the public interests, for, as already said, all the powers of both were in the same hands. But the street railway companies, though they had parted with the present control of all their powers except the reserved franchise to be a corporation, were nevertheless the owners, not only of all the franchises, but of all the plant or property necessary for

the use of such franchises. To them, by virtue of their reversionary interests, it would all finally come, upon the termination of the lease, whether by its own limitations, or by surrender for forfeiture, or new contract. There was therefore a legal propriety in naming such company as the grantee of the city's consent that the thing should be done. But whether or not this consideration entered into the matter at all, the circumstances leave no room for doubt that the consent of councils was that the thing should be done by the two corporations acting together as one, and such consent, whether it named one or the other, was meant to be operative as to both. This is the common sense view of the action and intent of councils, plain to all men. The subject was within their control, and what they meant by the ordinance is the law of this case. To refine it away and defeat its purpose by technicalities would be a misuse of legal principles, which are instruments to ascertain, not to defeat, legislative intent. We are clearly of opinion that the consent of councils, expressed in the ordinances on the subject, was sufficient.

Decrees reversed, injunctions dissolved, and bills dismissed with costs.

NOTE.— See note to *St. Louis v. W. U. Tel. Co.* (second decision), *post*.

THE STATE, ELEANOR GREEN, Prosecutrix, v. THE INHABITANTS OF THE CITY OF TRENTON AND THE TRENTON HORSE RAILROAD COMPANY.

New Jersey Supreme Court, Jan. 8, 1898.

(54 N. J. L. 92.)

ELECTRIC STREET RAILWAY.—MUNICIPAL CONTROL.—ABUTTING OWNER.—CERTIORARI.

(Head-note by the court):

The provisions of the act (Rev. Supp., p. 369, § 80), empowering the street railways, with the consent of the municipal authorities, to use electric or chemical motors or grip cables as the propelling power of their cars instead of horses, does not legalize the erection of poles and the stretching of wires in a public street as a part of a system of electrical railroad-ing.

An ordinance which purports to grant permission to erect such poles and stretch such wires is illegal.

An abutter, owning to the middle of a street, can use the writ of *certiorari* to test the validity of an ordinance which purports to confer the power to place such posts upon his land lying in the street.

WRIT of *certiorari* to review an ordinance authorizing the defendant, the Trenton Horse Railroad Company to adopt the use of electricity.

The following statement of facts is by REED, J. :

This writ of *certiorari* brings into this court the following ordinance passed by the common council of the city of Trenton :

'A supplement to an ordinance entitled "An ordinance to authorize the Trenton Horse Railroad Company to construct their road or track through the streets of the city of Trenton." passed July twenty-sixth, eighteen hundred and sixty-three. Whereas, application has been made to the common council of the city of Trenton by the Trenton Horse Railroad Company for permission to use electric motors as the propelling power of its cars through the streets of said city; and whereas, the said company has entered into a written agreement with the inhabitants of the city of

Trenton not to lay or use in the streets of the city of Trenton any rails not having inside flanges, and known as a "T" rail, and, further, that it will, at such time when an extension of the territorial limits of the city shall embrace any streets or roads upon which any such rails shall be laid, (which rails shall be used or controlled by such company in the operating of its railway system), immediately remove the same, and replace them with rails having inside flanges, which agreement is now on file in the office of the city clerk: Now, therefore, the inhabitants of the city of Trenton do ordain:

Section 1. That permission be, and the same is hereby, granted to the "Trenton Horse Railroad Company," of the city of Trenton, to use electric motors as the propelling power of its cars on all of the lines of the city of Trenton which they now or hereafter may control and operate, to be supplied with electricity from properly guarded overhead wires, supported by poles at least twenty feet high; which poles on Hamilton avenue and on Clinton street, from said avenue to State street, and on State street, from Assanpink creek to the waste-weir, between Calhoun and Prospect streets, shall be of iron or steel, and along the remaining parts of its lines shall be of dressed and painted cedar or other suitable wood; which poles are to be placed within the curb line, opposite to each other, and connected with steel wires; provided, when any of such wooden poles shall be removed or replaced, they shall be replaced with such iron or steel poles. Sec. 2. That the location and placing of the poles shall be under the supervision and direction of the city surveyor and the committee on railroads of common council. Sec. 3. This permission is granted upon the following terms and conditions: (1) The poles shall be placed at least one hundred and twenty-five (125) feet apart. (2) The said company, before commencing the work of constructing their overhead plant, shall present to said committee on railroads and bridges a detailed plan of such construction, the same to be approved by said committee, in writing, before any work is done under the permission hereby granted. (3) The said company is to maintain gates upon the sides of the platforms of their cars, so that ingress and egress to and from said cars can only be had from the side of the car nearest to the curb. All new cars placed upon the lines of the company shall be of the most approved pattern, and, except summer or open cars and tow-cars, shall have enclosed platforms. (4) That the said company shall commence the construction of such electric systems on or before the first day of April next, and complete the same, and operate and propel its cars with electricity on all its lines within the city, by the first day of April, A. D. 1892. (5) The said company shall run its cars at such rate of speed, not exceeding twelve miles an hour, as may be required by the common council, and on its branch lines running on State street east of Clinton avenue, and on Hamilton avenue, shall run a sufficient number of cars to make at least thirty (30) round trips daily, at regular intervals. Sec. 4. Nothing in this ordinance shall be construed to repeal, alter, or modify the agreement referred to in the preamble hereto, but the said agreement is hereby declared to continue in full force and effect. Sec. 5. That the said company shall pay for the advertising of this ordin-

ance according to law, and this ordinance shall not go into effect until payment for said advertisement shall have been made by said company. and they have filed with the city clerk a written acceptance of the provisions and conditions of this ordinance, executed by them in the manner corporations are required by law to execute such instruments; and a failure to file such written acceptance within sixty days after the passage of this ordinance shall be deemed and taken to be a refusal so to do on the part of said company, and thereupon all right and privileges to them hereby granted shall forever cease and be at an end.

The provisions of this ordinance were accepted by the defendants. The railroad company prepared a detailed plan, showing the location of the various poles which they propose to erect within the curb lines of State street, and one of said poles is to be erected upon the land of the prosecutrix, in State street, within the curb line thereof.

W. S. Gummere and Barker Gummere, for the prosecutrix.

R. S. Woodruff, A. Q. Keasbey, and Theodore Runyon, for the defendants.

The opinion of the court was delivered by REED, J.: The ordinance brought up by this writ is attacked upon the ground that the Common Council of the city of Trenton did not possess the power to enact it.

The defendants rest their claim that such power existed in the Common Council upon the terms of an act of the Legislature passed in 1886. Supp. Rev., p. 369. The second section of that act is in the following words:

That any street railroad company in this State may use electric or chemical motors or grip cables as the propelling power of its cars, instead of horses: *Provided*, it shall first obtain the consent of the municipal authorities having charge of the public highways or streets on which it is proposed to use such motors or grip cables.

The question propounded is whether, by the terms of the act, the Common Council is invested with the power to grant to a street railway company the privilege of placing

obstructions in the street in the shape of poles and wires. The counsel for the defendants contend for the existence of this power in the municipal body. The counsel for the prosecutrix, on the contrary, insists that the power of the council is limited to a grant of a permission to use motors upon or attached to the cars, but does not extend to a permission to erect structures upon the street, although for the purpose of supplying such motors with the electric fluid.

The canon of construction to be applied to this grant of power is entirely settled. As against the public grantor, the grantee must rely upon the express words in the statute, or upon a necessary implication. If there exists a doubt as to the extent of the grant, or any ambiguity as to its terms, such doubt must be resolved against, and such ambiguity must operate against, the grantee, in favor of the public.

Bridge Co. v. Hoboken, 13 N. J. Eq. (2 Beas.) 94; *Del. & Rar. Canal and C. & A. R. & T. Co. v. Rar. & Del. Bay R. Co. et al.*, 16 N. J. Eq. (1 C. E. Gr.) 372; *Sunderland on Statutory Construc.*, p. 378.

The power conferred is to use electric or chemical motors or grip cables as the propelling power of cars, instead of horses.

The point to be now ascertained is, what was meant by electric or chemical motors, as those words were employed by the Legislature?

To assist in the ascertainment of the import of these words, much testimony has been taken to show the methods by which electricity was applied in operating railroads at the time of the passage of the act of 1886; also to show the progress of electrical railroading since that time; also to exhibit the opinion of experts regarding what was comprehended by the word motor. From this testimony it appears that on March 6, 1886, the date of the passage of the act under consideration, there were then, and had been for five years, in operation electric motors, the use of which would be indubitably within the provisions of this

act. These motors were placed within the cars. The result of the use of these motors was to discharge the horses from service, and so diminish, instead of increasing, the extent to which the cars had occupied the street. This is known as the storage battery system.

Then there was another system in use, in which electricity was not stored in the motor, but was conducted to the motor along a third rail, laid between the two rails upon which the car wheels move. Then there was another similar system, in which the electric fluid was conducted along an insulated wire under ground, and communicated to the motor through a slot. It is perceived that the operation of neither of these systems involved the obstruction of the street to an extent greater than before.

Then, about the date of the passage of the act of 1886, there was put in operation a half mile of railroad in Baltimore by the use of an overhead wire, from which the fluid was conducted to the motion-producing apparatus within the car. The overhead wire was supported by poles placed in the street, and so involved an obstruction to the use of the street which had not theretofore existed. This is the trolley system, which the defendants are trying to utilize with the aid of the questioned ordinance.

The use of electricity at the date of the passage of the Act of 1886 was in an experimental stage. Indeed, it has not yet, and probably will not for some time, entirely emerge from this condition. So far as electricity had been practically used as a motive power in the propulsion of cars, there is nothing to indicate that the Legislature, from its knowledge of such use, could have intended, when speaking of a motor, anything more than an appliance attached to a car, by which the electric force was stored, or was received and transmitted into motion. There is nothing to indicate that it was intended by the use of the term "electric motor" to include any apparatus outside of the car which would cause an additional obstruction to public travel, and an additional inconvenience to the abutting land owners. The views of the experts, also,

make it entirely clear that while, as one witness says, "motor" was sometimes loosely used to designate a whole car, it was never employed to designate anything not a part of the car. Construing this act in the light of the condition of electric railroading in March, 1886, and of the views of the experts, I think it clear that the word "motor" meant the motion-producing contrivance in the car.

But the defendants claim that since the passage of the act of 1886 the relative merits of the several systems have been decisively tested. They claim that the result of these tests is to demonstrate that at the present time the overhead or trolley system is the only scheme which is commercially successful; that it is the only system by which street railroads can be run by electricity more cheaply than by animal power.

I think that it is true that at the present moment the trolley system is the best, and perhaps the only practicable electrical substitute for horse power. It is uncertain how long this will continue to be true; for scientific inquiry and experiment is astir, touching new methods in the use of the electric fluid for railway purposes.

Now, the defendants insist that the grant of power to use an electric motor carries with it, by implication, the privilege of employing such accessories as are necessary to utilize the express grant. Assuming that the overhead or trolley system is the only one by which the use of an electric motor can be made commercially successful, they claim that the right to use this system springs out of the express grant. This is the substance of the defendants' insistence.

Now, I think it true that the express grant did carry with it certain incidental privileges. This is perceived in the grant of power to employ grip cables, which obviously includes the right to change the street between the tracks so as to adjust it to the purposes of cable movement. In like manner the laying of a third rail or a wire between the metals would be regarded as an incidental privilege in operating an electric motor in the methods already men-

tioned. These would not change the character of the street railroad in respect of the extent of its occupation of the street.

But the claim of the defendants goes far beyond this. Their pretension goes to this extent: that if any scheme of supplying electric fluid to electric motors is essential to the economical operation of a railroad, then there exists a power to erect any structure which may be a part of such system.

I am unable to take this view of the implied powers granted in the act of 1886. It would involve consequences never intended by the Legislature. According to this construction of the act, if the erection of an engine-house in a public square, for the operation of cables or the generation of electricity, should be a part of such a system, such structure would be protected by the terms of the statute. If such a system of electrical or cable movement of cars involved the elevation or depression of railway tracks so that the part of the street occupied by the metals would become useless for ordinary travel, this would also be within the protection of the act. If the scheme included the construction of a solid wall along the tracks, or the entire exclusion of any passage-way between the sidewalk and wagon-way, it would be validated by the act. It seems too obvious for argument that the Legislature had no intention to grant privileges so extensive and burdensome as these. But if the term motor is to be held to include posts, arms and wires in the street, or if it be held that the right to use a motor impliedly carries with it the right to employ these posts, arms and wires, it would seem difficult to define what obstruction in a street might not be legalized by this act.

I think it clear that there was never any legislative design, expressly or by implication, to empower a private corporation to change, or to grant power to a Common Council to permit such corporation to change the character of a street railway.

I mean by the term "character of a street railway" its

method of using a public street as such use has heretofore been recognized.

The placing of the tracks level with the surface of the street, the distance between the rails, the location of the rails in the street, the condition of the street between the rails, have always been carefully regulated so as to present practically no interference with the use of the entire street for all kinds of vehicles. It is because of this feature of street railways that their occupation of a street, as distinguished from that of steam railways, has been held to be but a modification of the ordinary use of streets by vehicles. It was this characteristic that was recognized by Chancellor GREEN as the ground of decision in the case of *Hinchman v. The Patterson Horse R. R. Co.*, 17 N. J. Eq. (2 C. E. Gr.) 80.

The Chancellor alludes in his opinion in that case to these material facts: That the road was required to be laid level with the street; that there was no embankment or excavation; that the use of the road was nearly identical with that of the ordinary highway, and the motive power was the same. It was upon the ground of similarity of uses by a street railway and ordinary vehicles that the railroad company in that case evaded an injunction.

Now, it should require the clearest expression of the legislative intention to warrant a claim by one of these corporations that it possesses the prerogative of permanently depriving the public of the use of an inch of the public highway. Not only is there an absence of such an expression of intent, but there seems to be manifested in the form of the grant of power an adverse purpose. The grant is of power to substitute motor for horses. It seems to indicate that while horses need not be used, but another motive power may be applied, yet the road shall in all other respects retain its character. It would seem to exclude the notion that a company can erect obstructions in a public street, which obstructions are antagonistic to the ordinary use of the street, and strange and novel in the operation of a horse railroad.

But it is to be finally remarked that the implication of the grant of this power is not a necessary one ; for an electric motor may be operated, as we have shown, without street obstruction.

And, in respect of the trolley system itself, it is to be observed that while the erection of posts is essential to the successful operation of the system, nevertheless the location of posts in a public street is not necessary for its operation. Posts placed upon private property adjoining the street will subserve the purposes of this system. This involves a difference in expense and trouble, but involves no radical obstacle to the successful operation of the electric motors.

The conclusion is that the act of 1886 expressly grants only a right to use—with the consent of the municipal authorities—an electric machine attached to some part of a car for the purpose of transmitting electric energy into car movement. The act contains no implied grant of power to obstruct the ordinary use of a public street by posts, wires, or any other apparatus designed to be used in connection with an electric motor.

The Common Council had no power to authorize or consent to anything more than the use of an electric motor. The ordinance pretending to vest, as it does, in the defendant corporation, a right to place posts and string wires in the public streets, is a nullity.

It is perceived that this result does not rest upon the want of power in the Legislature to authorize these erections upon the land of an abutting owner without providing compensation, upon which question no opinion is expressed, but rests upon the intention of the Legislature as expressed in the act.

The defendants insist, however, that the prosecutrix has no standing from which she can attack this ordinance by the use of the writ of *certiorari*. I think she has. Unless these poles are to be placed in their intended position by some one having authority to do so, they will constitute a nuisance. Inasmuch as the prosecutrix owns the fee to

the middle of the street, such an erection will also be a trespass. *Winter v. Peterson*, 24 N. J. L. (4 Zab.) 524; *Wuesthoff v. Seymour et al.*, 22 N. J. Eq. (7 C. E. Gr.) 66-70; *State v. Laverack*, 34 N. J. L. (5 Vr.) 201-208; *Waterman on Trespass*, §§ 698, 699.

The execution of the project which this ordinance professes to authorize involves a special injury to the prosecutrix, and she is not bound to await its accomplishment. She has the right to anticipate this injury by testing the legality of the ordinance which professes to confer the right to inflict it. *State, Danforth v. Paterson*, 34 N. J. L. (5 Vr.) 163; *State, Gregory v. Jersey City*, 34 N. J. L. (5 Vr.) 390; *State, Bodine, Pros. v. Trenton*, 36 N. J. L. (7 Vr.) 198.

This ordinance is set aside.

NOTE.— This case is cited in the following cases in this volume: *State, Halsey, Pros. v. Newark*; *State, Lewis, Pros. v. Freeholders*; *Trustees Presbyterian Church v. State Board*.

See note to *St. Louis v. W. U. Tel. Co.* (second decision), *post*.

State, Halsey, Pros., v. Newark.

THE STATE, GEORGE A. HALSEY, Prosecutor, v. THE CITY OF NEWARK AND NEWARK PASSENGER RAILWAY COMPANY.

New Jersey Supreme Court, Jan. 8, 1892.

(54 N. J. L. 102.)

ELECTRIC RAILWAY.—MUNICIPAL CONTROL.

(Head-note by the court):

A resolution of Common Council giving consent to a street railway to place posts and stretch wires in a street, and prescribing the size and location of the poles, and limiting the speed of the railroads when operated by electricity, is a street regulation, which, under the charter of Newark, must be by ordinance.

Argued with preceding case.

THE facts are stated by the court as follows:

This writ of *certiorari* brings up a resolution passed by the Common Council of Newark on December 17, 1890.

The resolution, in its first clause, purported to grant to the Rapid Transit Street Railway Co. of the city of Newark, and to several other companies, the right to use electric motors to be supplied with electricity from overhead wires supported by posts to be placed in the street.

The second clause regulates the distance between the posts; imposes upon the companies the duty of providing electric lights upon the posts in the middle of the street; also the duty of establishing a system of transfers; also of maintaining gates upon the sides of the platforms of the cars.

It limits the maximum rate of speed of the cars. It provides for a substitution of some other system for the overhead system, under certain named conditions. These are the main points touched by the resolution. The cause involves the same question as that of the *State v. The Common Council of the City of Trenton*, and the two cases were

argued together ; the testimony taken in the present case being, by consent, used in both cases.

J. R. Emery and *F. W. Stevens*, for prosecutor.

Riker & Riker, *A. Q. Keasbey*, and *Theodore Runyon*, for the defendants.

The opinion of the court was delivered by REED, J.: The main question discussed in this case is, whether the Common Council of the City of Newark possessed the power to pass the resolution, the substance of which has been set out. The power to pass this resolution was claimed to exist in the terms of the Act of 1886 (Rev. Supp. 369), already set forth in the opinion in the preceding case of *The State, Green, Prosecutrix, v. Trenton H. R. R. Co.*

The ordinance in that case conferred privileges similar to the ordinance in this.

All that was said in the previous case relative to the scope of the act of 1886 is applicable in this case.

The result is, that the resolution must be regarded as a nullity.

But, if it should be conceded that there was power in the Common Council to deal with the subject matter of the resolution, I think such power should have been exerted by ordinance.

The grants, restrictions, and limitations contained in the resolutions, were regulative of the use of the streets.

That the regulations of streets shall be by ordinance or by law, and not by resolution, seems to be the necessary conclusion, from the language of section 30, paragraph 7, and section 96, paragraph 3, of the Charter of Newark, P. L. 1857, pp. 132, 162; *State v. Hoboken*, 35 N. J. L. (6 Vr.) 205; *Ibid.* 335; *State v. Lambertville*, 45 N. J. L. (16 Vr.) 279; *Peoples' Gas-Light Co. v. Jersey City*, 46 N. J. L. (17 Vr.) 297.

In regard to the right of the prosecutor to sue out this

Haines v. Railway Co.

writ, it appears that the poles in front of his property were to be placed in the middle of the street.

In Springfield avenue the poles were placed, or some of the poles were placed, entirely upon his land. If placed in accordance with the directions of the resolution, each pole would be partly upon his land, and the arms upon the post would sweep over it.

This gives the prosecutor a footing in court to try the legality of the resolution.

The resolution is set aside.

NOTE.—See note to *St. Louis v. W. U. Tel. Co.* (second decision), *post*.

HAINES V. TWENTY-SECOND STREET AND ALLEGHENY AVENUE PASSENGER RAILWAY COMPANY.

Philadelphia (Pa.) Co. Common Pleas, July 9, 1892.

(1 Pa. Dist. Rep. 506.)

STREET RAILWAY.—CHANGE OF MOTIVE POWER.—INJUNCTION.

A street railway company whose articles of incorporation provide "that said railway is to be operated by horse power," cannot change to the overhead trolley electric system, and municipal corporations have no right to authorize such change.

BILL for injunction and answer.

Logan M. Bullitt and Richard C. Dale, for plaintiffs.

Rufus E. Shapley, for defendants.

ARNOLD, J: The railway company defendant in this case was organized May 14th, 1889, under the Act of Assembly approved the same day, for the formation of companies for

constructing, maintaining and operating street railways for the conveyance of passengers by any power other than by locomotive. In the articles of association it is provided "that said railway is to be operated by horse-power." Consent of the city councils to said company to use electric motors, to be supplied from overhead wires, and to erect and maintain poles to support said wires, was given to the company by an ordinance passed, notwithstanding the veto of the Mayor, on March 31, 1892. The objection of the plaintiffs is that as the corporations have expressly confined themselves to horse-power as the means of operating the railway, therefore they are not authorized to use electric trolley motive power. To this the company replies, that the clause in regard to the power to be used is a mere surplusage, not required by the Act of Assembly, and therefore not binding upon the company.

We cannot agree to this. The act recognizes a distinction between animal power and other power by making a difference in the amount of capital stock per mile, which the company may issue, according to the power to be used, and consequently the amount of bonded debt it may incur, so that the power selected is not inconsequential, but a substantial matter. Therefore, when a company expressly names the power it intends to use, it will be held to its choice until it obtains an amendment to its charter. The cases cited, notably the case of the *Oregon Railway and Navigation Co. v. Oregon Railway Co., Limited*, 130 U. S. 1, show this. In that case it was held that when a corporation is organized by articles of association under general laws, the articles of association stand in the place of a legislative charter, and that its powers cannot exceed those enumerated therein. That the governor must issue letters patent under the law can make no difference. His duty is merely ministerial. He has no right to refuse a charter. All that he can do is to see that the articles of association claim nothing not authorized by law. The incorporators may claim all that the law authorizes or only a part, and when they make this choice, they must abide by it.

Powell et al. v. Railroad Co. et al.

An injunction will be issued to restrain the company from erecting an electric trolley railway.

NOTE.—See note to *St. Louis v. W. U. Tel. Co.* (second decision), *post*.

H. T. POWELL ET AL. V. MACON & INDIAN SPRINGS R.
R. CO. ET AL.

Georgia Supreme Court, June 26, 1893.

(92 Ga. 209.)

ELECTRIC STREET RAILWAY.—RIGHT TO USE STREET AND MAINTAIN POWER
HOUSE.—INJUNCTION.

(Head-note by court) :

1. Under the charter of the Macon & Indian Springs Railway Company, and the general clause in the charter of the city of Macon giving it power to control its streets, the mayor and council of the city had the power to grant to the railway company the privilege of constructing and operating a main line of railway, such as the company's charter contemplates, along the streets of the city for the purpose of transporting thereon passenger cars propelled by electricity ; and also had the power to grant to the railway company the right to construct along a street of the city a proper and reasonably necessary spur-track, connecting the main line of the railway with a point in the city at which the company had in contemplation the erection of a power house and a shed for the storage of its cars when not in use.
2. Although the railway company was authorized by its charter to carry both freight and passengers, the grant of rights and privileges made by the city to the company was not invalidated because of a stipulation in the grant that no freight should be carried through the streets of the city by the railway company except by permission of the mayor and council.
3. It was also within the power of the municipal authorities to grant to the railway company the right to construct a power house and car shed at a proper and convenient point within the limits of the city. This being so, and the evidence being conflicting as to whether the erection and use thereof at the place selected would result in any injury to the plaintiffs, there was no error in declining to adjudge, in advance of the erection of the power house, that the use of the machinery which the company expected to employ therein would be a nuisance, and consequently there was no abuse of discretion, in refusing the injunction prayed for.

APPEAL by plaintiff from decision of Superior Court, Bibb county, denying an injunction against the erection of a power house by an electric railway company. Facts stated in opinion.

Gustin, Guerry & Hall, J. A. Thomas and Marion Erwin, for plaintiffs.

Washington Dessau and R. W. Patterson, for defendants.

LUMPKIN, Justice: 1. By the charter of the Macon & Indian Springs Railway Company (Acts of 1890-91, vol. 1, p. 325), the company was empowered to build and maintain a railroad from a point at or near Macon to or near a point in Butts county, known as the Indian Springs. The purpose of the charter seems to have been to authorize a railway connection between the places named, but not to authorize the establishment of a system of street railways in the city of Macon. The petition, however, does not distinctly raise the question as to whether or not, with reference to the action of the company sought to be enjoined, it was in good faith endeavoring to avail itself of the rights and privileges really secured to it by its charter. Our ruling, as announced in the first head-note, undertakes to state our opinion of what the company has a right to do in the exercise of the franchises granted by the legislature and the municipal authorities of Macon.

The third section of the charter gives the company the right "to construct its railroad across, along and upon any river, or other waters or water-courses, *streets*, highways or canals, which the lines of said railroad shall intersect or touch;" and in the ninth section it is provided "that said company shall not have the right to take or use any part of any street or public road without the consent of the authorities of the city or county, as the case may be." Construing these provisions in connection with the general

clause in the charter of the city of Macon, giving it power to control its streets, we are of the opinion that there is sufficient legislative authority for the company, with the permission of the Mayor and Council of the City of Macon, to construct and operate along the streets of the city a main line of railway, such as the company's charter contemplates. That is to say, a railway which would be a *bona fide* and essential part of a line connecting the city of Macon with Indian Springs. It will be observed that the words first above quoted from the charter are quite general, and cannot be fairly said to merely allow the crossing of streets. They are sufficiently comprehensive to permit the construction of a railroad longitudinally along the street, at least for the transportation of passenger-cars propelled by electricity. Under the principle announced in *Daly v. Ga. So. & Fla. R. R. Co.*, 80 Ga. 793, it may be that the right to lay railroad tracks upon the streets of the city of Macon, and run steam engines upon the same, might require more definite and explicit legislative authority. But be this as it may, we think our ruling in the present case is sound. Common experience and every day observation show beyond question that there is a wide difference between trains of cars drawn by locomotives of which steam is the motive power and the ordinary electric passenger-car which is now in common use in the cities and towns throughout the length and breadth of the land. In the one instance, the street may very properly be said to be burdened with an additional servitude, entirely inconsistent with the free use of the same by the public; in the other, this reasoning, in the light of experience, would not aptly apply.

We do not rule that the city authorities could grant to this company the rights above mentioned, as to streets upon which the company was not, in good faith, building a main line from Macon to the Indian Springs, but as to which it was improperly using its charter by constructing therein parts of a street railway system for the city of Macon

and its suburbs ; because, as above intimated, this question is not really in the case.

Every electric railway needs a power-house and a shed for the storage of cars when not in use, and, of course, has a right to erect the same at a convenient place or places. They cannot be located in the streets of a city, and yet would be useless to the company unless connected with its main line. These things being so, we think the General Assembly intended that this company should have the right to construct along the street of a city a suitable spur-track for this purpose, and that the language of the charter is sufficient to effectuate this intention. To deny the right in question would be to practically prevent the company from having a power-house and car-shed within the limits of the city, and force it to erect these structures outside of the corporate limits, a result which, in our opinion, could not be reached under a fair and reasonable construction of the charter.

2. The company was authorized by its charter to carry both freight and passengers. The Mayor and Council of the City of Macon, in granting to it the rights and privileges above referred to, did so upon condition that no freight should be carried through the streets of the city except by permission of the Mayor and Council. Surely, this restriction did not invalidate the grant to the company by the city. Because the company obtained from the city less than the latter might have granted, affords no reason for declaring void the rights which were actually granted.

3. We have already seen that the company had a right to construct its power-house and car-shed within the limits of the city, and to connect its main line therewith. At the hearing, the evidence was conflicting as to whether or not the location and use of these structures at the place selected by the company would result in any real injury to the plaintiffs. We therefore follow the universal rule applicable in cases of this kind, in holding that the chancellor did not err in declining to adjudge in advance that these struc-

State, Lewis, Pros., v. Freeholders.

tures, and the use of the machinery which the company expected to employ therein, would be a nuisance. There was no abuse of discretion in refusing the injunction.

Judgment affirmed.

NOTE.—See note to *St. Louis v. W. U. Tel. Co.* (second decision), *post*.

THE STATE, FRANCIS M. LEWIS, Prosecutor, v. THE BOARD OF CHOSEN FREEHOLDERS OF CUMBERLAND, THE BRIDGETON RAPID TRANSIT COMPANY AND SOUTH JERSEY TRACTION COMPANY.

New Jersey Supreme Court, Feb., 1894.

(56 N. J. L. 416.)

ELECTRIC RAILWAY.—MUNICIPAL CONTROL.—CONSTRUCTION OF ORDINANCE.

A street railway company, by law forbidden to use the electrical trolley system, can confer upon its lessee no greater right than itself has. And a resolution of a county board, authorizing such lessee company to use "any mechanical power except steam" must be construed as meaning any power which the company could legally use, and so not to warrant the use of the trolley system.

Although a county board is empowered to control the manner in which bridges shall be used, still the courts may interfere by *certiorari* when it affirmatively appears that consent of the board has been given to run electric cars over a bridge, without previous inquiry to enable it to act intelligently, and that the bridge is in fact too weak for the purpose.

Case of this series cited in opinion: *State, Green, Pros. v. Trenton, ante*, p. 80.

ON certiorari. Facts stated in opinion.

William E. Potter, for the plaintiff.

Anthony Q. Keasbey, for the defendants.

The opinion of the court was delivered by VAN SYOKEL, J.: This writ brings up a resolution of the board of chosen

freeholders of Cumberland county, passed December 14th, 1892, giving permission to the Bridgeton Rapid Transit Company, its successors and assigns, to lay double tracks across a county bridge, over a navigable stream, in Bridgeton, and the right to operate a street railway thereon by any mechanical power except steam.

The *Bridgeton Rapid Transit Company* was incorporated November 23rd, 1892, under the act of April 6th, 1886, and the supplements thereto. *Pamph. L.*, p. 185.

Under this organization the rapid transit company had no right to construct a trolley road. *Green v. Trenton*, 25 Vroom. 92.

On the 20th day of April, 1893, the South Jersey Traction Company was organized under the act of April 14th, 1893. *Pamph. L.*, 302.

On the 23rd of June, 1893, the Bridgeton Rapid Transit Company, by a lease of that date, granted and devised to the South Jersey Traction Company, its successors and assigns, for the term of nine hundred and ninety-nine years, all the property and all the rights, powers, franchises and privileges of the lessor, reserving as a rent therefor the sum of \$1 per annum.

The rapid transit company never did any work in the construction of a street railway, but after the execution of said lease the traction company proceeded with the construction of a trolley road until it was arrested in its work by the allowance of a writ of *certiorari* in this case.

It is the duty of the board of freeholders to erect and maintain bridges like the one referred to in this resolution, whether within or without the limits of a city. *Whitehall v. Freeholders*, 11 Vroom. 302; *Beatty v. Titus*, 18 id. 89.

For the neglect of this duty indictment will lie. There is nothing in the act of 1886 or in the charter of the city of Bridgeton (*Pamph. L.*, 1875, p. 354), which, expressly or by implication, deprives the board of freeholders of the right to exercise such supervision and control over this bridge as will enable it to perform its statutory duty.

That duty cannot be performed unless the board may, within reasonable limits, control the mode in which the road shall be used.

This bridge was constructed by the board of freeholders of Cumberland, by authority of the act of the Legislature, passed March 14th, 1867 (*Pamph. L.*, p. 269), and by said act is under the control of said board.

It must follow, therefore, that the consent of the board is a prerequisite to the right of a street railway company to use the bridge.

A large portion of the sum raised for county purposes by taxation upon every citizen, within and without the limits of incorporated cities, is often appropriated to the expense of erecting and maintaining such bridges.

The duty devolved upon the board of freeholders, before passing said resolution, to see that the bridge was safe for the new use.

While the courts cannot interfere with the board of freeholders in the proper exercise of their powers, their action may be reviewed when they wrongfully, illegally or fraudulently appropriate the public moneys, or where they transcend their powers, or clearly abuse the discretion committed to them. *Lewis v. Freeholders*, 8 Vroom. 254; *McKinley v. Freeholders*, 2 Stew. Eq. 164.

In this case it is clear from the testimony that the bridge, in its present condition, is not of sufficient strength to bear with safety the added weight and wear of a street railway, and not of sufficient width to permit of the granted use without injurious interference with ordinary travel.

The case shows expressly that, prior to the passage of the resolution, the board of freeholders instituted no inquiry as to whether the bridge would bear the additional burden. It was not until afterwards that they employed an expert engineer, who reported that it would be unsafe to allow the bridge to be occupied by the street railway.

The question is not whether, when the board of freeholders has exercised its discretion and passed its judgment upon the propriety of permitting the use of the public prop-

erty in a given way, this court can review its action, but whether it can do so, when it affirmatively appears that the board allowed a county bridge to be appropriated to the use of a private corporation, by which the bridge is endangered and the safety of public travel impaired, without previous inquiry to enable it to act intelligently. I think that the resolution certified was passed by the board of freeholders improvidently in abuse of their power, and there appears to be no mode of protecting the public interest in such a case, except by the writ of *certiorari*. But if the resolution adopted by the board of freeholders is without the alleged infirmity, the South Jersey Traction Company can derive no authority under it to use the bridge for its purposes. The resolution gives power to the rapid transit company to operate a street railway thereon by any mechanical power except steam. This language must be interpreted to mean "by any mechanical power which said rapid transit company might lawfully use." As before stated, that company, under the case of *Green v. Trenton, supra*, could not introduce the trolley system. It acquired no right, by virtue of this resolution, to apply that system, and could transmit to the traction company no greater right than it had. The rapid transit company had the right, under the act of 1886, to carry passengers only, while the traction company, under the act of 1893, is authorized to carry both passengers and freight. It cannot be assumed that the right to use the bridge would have been granted to the latter company, the conditions being so essentially different. The traction company is without authority from the board of freeholders to use the bridge. The only remaining question is whether, if the resolution is illegal and the subject of review, the relator has a right to intervene by *certiorari*. His *status* is that of a taxpayer of the city and county, subject to taxation for the purpose of maintaining the bridge.

A long line of decisions has recognized the rule that any taxpayer may prosecute a writ of *certiorari* to review any municipal, or other official action, which tends to burden his taxing district with a debt. *State, Gregory, v. Jersey*

State, Lewis, Pros., v. Freeholders.

City, 5 Vroom. 390 ; *Seidler v. Hudson County*, 10 id. 632 ; *State v. Paterson*, id. 490 ; *Conover v. Davis*, 19 id. 112 ; *Read v. Atlantic City*, 20 id. 558.

It is not necessary for the taxpayer to wait until the assessment upon the illegal act is levied. Public policy requires that this rule should be liberally exercised in aid of those who, at their own expense, are willing to invoke this legal remedy to lessen the burden of taxation.

The relator has such an interest in the subject matter of this controversy as entitles him to the judgment of this court upon the legality of the resolution certified. In my opinion the resolution should be set aside.

Whether the traction company can use the public street for cars propelled by electric motors, without acquiring the rights of abutting landowners, is a question upon which no opinion is intended to be expressed.

NOTE.—See note to *St. Louis v. W. U. Tel. Co.* (second decision), *post*.

MONONGAHELA CITY V. MONONGAHELA ELECTRIC LIGHT COMPANY.

Washington County (Pa.) Common Pleas, Nov. 3, 1892.

(12 Pa. Co. Ct. R. 529.)

ELECTRIC LIGHT POLES.—MUNICIPAL CONTROL.—MANDAMUS.

To care for and improve its streets is within the police powers of a municipal corporation. This includes the power to establish or change curb lines, and to compel the removal of poles to conform thereto.

In the absence of fraud, corruption or oppression, the courts have no power to interfere with the exercise of such power, in the discretion of a City Council; and from its decision there is no appeal by a private corporation, *e. g.*, an electric light company, whose occupancy and use of the street is adverse to and not for the benefit of the traveling public.

All legislative grants to private corporations to occupy streets with electrical appliances are made impliedly, if not expressly, subject to the police powers of the municipality, both to dictate and to change the location of such plant.

Mandamus is the proper remedy to compel obedience to an order of a city, made in the exercise of its police powers.

Case of this series cited in opinion: *Philadelphia v. W. U. Tel. Co.*, vol. 3, p. 52; *W. U. Tel. Co. v. Philadelphia*, vol. 2, p. 98; *Suburban Light & Power Co. v. Board, etc.*, vol. 3, p. 80; *Lancaster v. Edison Elec. Illum. Co.*, vol. 2, p. 116.

PETITION of members of street committee of Monongahela City, setting up that in the course of certain street improvements, it became necessary to have the poles of the defendant removed to other places, so as to be in the curb line of the sidewalk; that upon demand made the defendant had refused to remove them; and asking for an order to show cause why a writ of peremptory mandamus should not issue to compel the removal of the poles. By amendment, an alternative mandamus was also prayed for.

The defendant first moved to quash the writ of alternative mandamus, which motion being denied, it filed a return.

On demurrer to the return the following opinion was written :

George A. Hoffman, Jr., and T. H. Baird, for relator.

Charles G. McIlvaine and J. M. Braden, for respondent.

McILVAINE, P. J.: The material part of the defendant's return may be summarized as follows :

1. That the relator is not a municipality.
2. That the action of the city councils requiring the defendant's poles to be removed was unnecessary, and
3. That the poles having been located where they now are by permission of the city, under a legislative grant, the city cannot require their removal, at least at the expense of the defendant company.

We have already in our opinion on the motion to quash the alternative writ of mandamus held that the relator is a municipality. We have judicial knowledge of the fact that it elects municipal officers and is at least a *de facto* municipal corporation, and the defendant's return justifies the erection and maintenance of its poles by quoting the official action of these corporate officers. And as we said in our former opinion, we are fully satisfied for the purposes of this case and for all that appears in the record thereof, Monongahela City is a municipal corporation, with full power to improve the streets for public travel and convenience.

Again, we are of opinion that what improvements are necessary for the safety and convenience of the traveling public is a question for the city council to determine, and that the defendant cannot question the wisdom of the discretion exercised by the councils in this behalf. There is no allegation in the return that there was any fraud, corruption or oppression connected with the action of councils in ordaining the public improvements of the streets which required the removal of the defendant's poles.

The return questions the necessity of making the

improvement in the manner agreed upon and planned by councils, and alleges that the improvement can be properly and safely completed by leaving its poles in the line of the curb, where they now stand. But who is vested with the authority to determine this question of necessity—the electric light company or the city council? And if they differ, has the court jurisdiction to decide between them?

The improvement of the streets, and what is necessary to complete a given improvement thereof, are matters solely within the control of the municipal corporation, and even the court can interfere only where there is fraud, corruption or oppression.

Where a street is graded, and a vitrified pavement is being laid, whether the poles of an electric light company should be allowed to stand in the line of the curb, and make a break therein and project out into the angle of the brick and curbstone which forms the water table, or should stand back of the curb line, leaving the curb continuous, and the water table free and unobstructed, is a question solely within the jurisdiction of the city councils, and from their decision there is no appeal by such a private corporation whose occupancy and use of the street is adverse to and not for the benefit of the traveling public.

The decision may, in the opinion of some, be wrong; but, if it is not unreasonable, and is devoid of fraud and corruption, it is final.

Now, as to the defendant company's claim of vested rights. When the consent of the city was given to the defendant company to occupy its streets with its poles, the legislative grant contained in its charter became complete. It lawfully occupied the streets of Monongahela City with its poles and wires. But all legislative grants to corporations, such as the defendant company, simply to occupy the streets of a borough or city, are made subject to the police powers of the municipality, one of which is to improve, keep in repair and maintain its streets for the convenience of the public. "Even though the legislative grant is *not* made *expressly* subject to municipal control,

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or the assent of the local authorities, the grant must be taken subject to the general control of municipal corporations over streets." 2 Dillon Mun. Corp. § 680.

Where the Legislature have given a company, like the defendant, a general grant to enter the streets of a city, still the city, in the exercise of its police powers, can supervise and control the erection and maintenance of its poles and wires, and may even require a license for maintaining the poles upon the streets. 2 Dillon Mun. Corp. 698; *Phila. v. W. U. Tel. Co.*, 11 Phila. 327; *W. U. Tel. Co. v. Phila.*, 22 W. N. C. 39; *Suburban Light and Power Co. v. Boston*, 153 Mass. 200; *Lancaster v. Edison Electric Co.*, 8 Pa. C. C. Rep. 178.

In the case reported in 22 W. N. C., at page 41. the court says: "To say that a corporation or individual who has the right, either as a chartered body or as a natural person, to erect poles in the public highways can do so without any restraint whatever, and without any liability to have the exercise of that right regulated with reference to the rights of other persons exercised upon the same highway or to the rights of the municipality, appears to me to be the assertion of a proposition which would practically take the control of the streets out of the hands of the city and place them in the hands of individuals or corporations."

And to say that because the city had allowed or directed the poles, when first erected, to be placed on a certain line, it could never direct their location changed in order to improve a street according to a plan duly agreed upon for the public convenience, would be to say that when a local, private corporation once placed its poles upon a street under a legislative grant and with the assent of the city, that that street could never be so improved as to require a change of the location of these poles. Such a doctrine would be subversive of municipal government. Finally, we hold that whenever any local, private corporation, under a legislative grant, enters upon the streets of any city or borough, it does so under and subject to the general police powers of the municipality; and that when those powers

are exercised reasonably and not fraudulently, corruptly and oppressively by the municipal corporation the private corporation has no such vested rights, in the occupancy of the streets, as will defeat this official municipal action.

The relator had a clear legal right to improve Second and Chess streets and to establish the curb lines thereof, and it was the duty of the defendant to remove its poles whenever the city officially found that their removal was necessary to properly complete the improvement, and so notify it.

And the company having refused to move the poles, and the city having no other adequate and specific remedy, it is entitled to a peremptory writ of mandamus.

And now, Nov. 8, 1892, the cause came on to be further heard and was argued by counsel, whereupon, upon due consideration, it is ordered, adjudged and decreed, that the relator's demurrer to the defendant's return to the alternative writ of mandamus herein before issued be and the same is hereby sustained, and that said return is insufficient; and it is further ordered, adjudged and decreed that in default of a sufficient return a peremptory writ of mandamus be issued.

NOTE.—See note to *St. Louis v. W. U. Tel. Co.* (second decision), *post*.

**THE CITIZENS' ELECTRIC LIGHT & POWER COMPANY V.
LOUIS SANDS AND THE CITY OF MANISTEE.**

Michigan Supreme Court, June 1, 1893.

(95 Mich. 551.)

ELECTRIC LIGHT POLES.—MUNICIPAL CONTROL.—INJUNCTION.

A statute provided that electric light and other electrical companies might place and maintain conductors in streets of cities "with the consent of the municipal authorities thereof, under such reasonable regulations as they may prescribe." Pursuant to this statute, the complainant placed its appliances in the streets of a city, as designated by the Common Council.

An ordinance then in operation provided that electric light poles should be under the control of the Council so far as to permit their use by other parties than those who erected them, for lighting purposes, upon payment of a reasonable portion of the cost of the poles and of erecting them. Held, that permission under this provision must be accompanied with such regulations and limitations as to the manner of use as would protect the owner of the poles, and the employes of both parties, and the public; and that a resolution granting such permission without such regulations was unreasonable and void.

Under the statute first above referred to, and others, held, that the city might contract for the electric lighting of its streets and public places, with individuals as well as with corporations.

Case of this series cited in opinion: *State, Dom. Tel. & Teleph. Co., Proc., v. Newark*, vol. 2, p. 141.

APPEAL by the complainant from a decree of Circuit Court, Manistee county, in chancery, dismissing a bill for injunction, restraining defendant from maintaining electric light wires on complainant's poles. Facts stated in opinion.

Smurthwaite & Higgins, for complainant.

Dovel & Smith, for defendant Sands.

Geo. L. Hilliker, for defendant city.

LONG, J.: Complainant was incorporated under chapter 127, How. Stat., entitled "Electric Light Companies." Section 10 of that chapter provides:

Every such corporation shall have power to acquire and hold all such real and personal property as shall be necessary for carrying on the business of such corporation; and shall have full power to produce, generate, furnish, and sell such electricity and electrical light as may be desired in any city, town or village where such corporation carries on its business, for lighting public or private buildings, streets or grounds, and for any other purposes; and such corporation shall have power to lay, construct, and maintain conductors for conducting electricity through the streets, lands, and squares of any such city, town, or village with the consent of the municipal authorities thereof, under such reasonable regulations as they may prescribe; and such corporation may make all such contracts and by-laws as may be deemed necessary and proper to carry into effect the foregoing powers.

Under this section complainant made application November 25, 1890, to the Common Council of the city of Manistee for permission to erect poles, wires, etc., in the streets of that city, and filed a bond as required by the city ordinance in relation thereto. At this time the city ordinance provided:

Sec. 1. No person shall erect or maintain within the limits of the city of Manistee any poles, wires, or lamps for the purpose of electric lighting, without first making application therefor to the council in writing, and filing in the office of the city clerk a good and sufficient bond, in an amount and with sureties to be approved by the council, conditioned that the person will comply in all respects with the provisions of this ordinance. **Sec. 2.** At the time of filing said bond such person shall also file with said city clerk a complete diagram, showing precisely the number and location of all poles, which diagram shall be approved by the council before poles can be erected. **Sec. 3.** Persons erecting poles under the provisions of this ordinance shall furnish the council a sworn statement of the accurate cost of poles and erecting the same. All poles to be straight, and of uniform size and length above ground, and to be and remain under the control of the council so far as to permit their use by other parties for lighting purposes, upon payment of the reasonable portion of the cost of poles and putting up the same, and by the city free of charge, for purposes of maintaining fire alarm and telephone wires for public use; any and all poles to be removed whenever ordered by the council.

The petition of the complainant was referred by the Common Council to a committee, who reported thereon December 11, 1890, as follows :

Your committee to whom was referred the petition, etc., beg leave to report that they have examined the diagram of such company, showing the location of poles, and recommend that such diagram be approved, except that on streets where electric poles are already erected the petitioner be required to use said poles as far as practicable. We also recommend that the bond filed by such petitioner be approved, and that a permit as above conditioned be granted the petitioner under the ordinance as this day amended.

The amendment to the ordinance referred to provided that wires were to be no less than 20 feet above ground at any point, and the poles not less than 40 feet high. Two new sections were also added, which provided that :

Sec. 4. No person, corporation, or company erecting or maintaining within the limits of the said city of Manistee any poles, wires, or lamps for the purpose of electric lighting or power, shall at any time enter into a combination with any other person, corporation, or company engaged in the business of supplying electric light or power within the said city concerning rates to be charged for electric lighting or power either to the city or to private consumers ; nor shall such person or corporation make any consolidation, transfer, or division of the territory, streets, or avenues of the said city with any other person, corporation, or company engaged in said business. Any violation of the provisions of this section shall work a forfeiture on the part of such person, corporation, or company to the said city of Manistee of all privileges or franchises granted under this ordinance.

The report of the committee was adopted and approved by the council. Complainant erected its poles according to the diagram recommended by the committee ; said poles being of the height of about forty feet above ground. It also strung its wires thereon, and in all respects complied with the requirements of the council under the provisions of the statute and ordinances of the city, except as hereafter stated.

It was proposed by certain individuals in said city to -
organize an electric street railway company, and procure a

franchise from the Common Council for that purpose; and, as alleged by complainant, said company intended to construct such street railway. The complainant obligated itself to transfer to this company, when organized, a one-half interest in all its poles along the line of said street railway company, or to lease to it the use of complainant's poles for the purpose of stretching and extending the wires necessary for the operation of the street cars by electricity. No company, however, ever organized.

Prior to the organization and incorporation of the complainant, the defendant, Louis Sands, had erected in the city of Manistee an electric light plant for furnishing to private consumers an incandescent light, and for that purpose had erected poles in the streets of the city. Though not incorporated, defendant Sands was doing business under the name of Sands Electric Light Company. The complainant charges in its bill that soon after its organization, finding that in many instances the poles of defendant Sands were located convenient for its use, it asked the Common Council that Sands be requested to file a statement of the cost of his poles as a preliminary step to having the Common Council investigate the matter, and, if found practicable, and for the public good, and advantageous to the complainant, and not an unwarranted interference with the property rights of defendant Sands, to make reasonable regulations for the use of Sands' poles by the complainant; but that defendant Sands refused to comply with such request, and gave notice that he should resist any attempt on the part of the city or complainant to use any of his poles by complainant or any other person; and upon inquiry of its electrician, complainant ascertained that the joint use of any pole by two lighting companies was impracticable or impossible, and the complainant thereupon erected its own poles in all places.

At and prior to the organization of the complainant, defendant Sands had entered into a contract with the city to light the streets with gas. After complainant was organized, Sands made a proposition to light the streets

with electric light for the unexpired portion of the gas-lighting contract. Complainant and Sands each entered a bid for this contract, complainant's being much lower than that of Sands; but, under the advice of the city attorney, the contract was let to Sands, as it was considered that the gas-lighting contract was valid. Under the contract made with Sands for lighting the streets with electricity no mention was made of the poles of complainant, or of any other person, and the city, by the contract, was in no manner bound to supply poles to Sands for his use under the contract, and the use was not such as was reserved to the city, being for neither fire-alarm nor telephone purposes.

The complainant's poles were erected under contract. Before settlement was had with the contractors, the Common Council passed a resolution requiring the complainant to file a statement of the cost of its poles. The complainant thereafter filed a writing explaining its inability to furnish the required information for the reason that it had not yet made a settlement with its contractors, but that it would furnish the same within a period of two weeks. At the same time it notified the Common Council that a one-half interest in the poles had been transferred to the electric railway company, to be used by it when organized. Within a week thereafter the complainant stated the cost of its poles approximately at \$12.60 each, and filed this statement with the city clerk. On the same evening that this statement was filed a regular meeting of the Common Council was held, and complainant, by its attorney, appeared before the council, and stated orally the reason why the complainant could not furnish a more particular statement, and promised to furnish the same within a short time. The council thereupon, and on the same evening, passed the following resolution:

Resolved, that Louis Sands be granted permission to use such of the poles erected by the Citizens' Electric Light & Power Company in the streets of the city of Manistee, pursuant to the provisions of an ordinance of said city, approved November 11, 1886, and the amendments thereto, as may be

necessary in placing the lights under his contract of June 8, 1891; and that he pay such part of the cost of any and all such poles used by him belonging to said company as this council may hereafter determine.

No notice had been given the complainant that such resolution would be offered, but complainant's attorney, being present at that time, requested the council to let the matter lay over for one meeting, until it could be looked up, and, if the council had a right to pass such resolution, notice could be given to all parties interested, and such rules and regulations made by the council as would protect the interests of all concerned. The resolution was passed, notwithstanding this objection. The next day the defendant Sands, with a force of men, commenced putting up cross-arms upon complainant's poles. It is contended that no question was asked complainant as to the manner in which or places where the different wires could be stretched upon its poles without damage or loss to them. The complainant had no opportunity to be heard, and had no voice in determining how its poles should be used. No rule or regulation was made by the Common Council as to when the electric currents should be let on or shut off of the wires used there by the complainant or Sands; and the complainant was not consulted by Sands as to the length of the cross-arms, or how Sands should string his wires thereon.

When Sands commenced putting up the cross-arms for the purpose of stringing his wires the complainant filed its bill, claiming that, if the Common Council had power to pass such a resolution, it could only be done after a full hearing as to the practicability of using the poles by two rival parties, and that such power could not be granted Sands as was attempted by the resolution, unless done by ordinance, or something having the authority of law, prescribing fully and expressly such rules and regulations as would fully protect the property of the parties and others and the lives of the employees. On the filing of this bill an injunction was issued against Sands, restraining his use of the poles. The city, thereupon, conceiving that it was interested in the subject-matter of the litigation, procured

a stipulation from the parties, admitting the city as a party defendant to the action. The testimony was taken in open court, and upon the hearing complainant's bill was dismissed, without costs. Complainant appeals.

It is contended by complainant :

1. That the resolution permitting Mr. Sands to use its poles without its consent, and without fixing the limits of the use, or regulating the manner in which each party is to string its wires and turn on its current, is unreasonable :

2. That the Common Council of the city had no power to grant to Mr. Sands the right to the use of complainant's poles for the purposes declared, for the reason that an individual could not contract with the city to erect poles or string wires for electric lighting.

It is conceded that under the charter the council had the power to pass the ordinance providing for the joint use of the poles ; but it is contended that the resolution passed by the council authorizing and empowering Mr. Sands to use them is too general in its terms, and, not limiting and fixing the manner or extent of the use, it is unreasonable and void. It is contended that it is universally known that electric currents sufficient for lighting purposes constantly endanger life and property, and must be conducted with the greatest care ; that employes must know when the currents are let on and shut off. It is further contended that the unreasonableness of the resolution is shown from the fact that it does not provide the number of arms on each pole, the number of wires on each arm, or whether arms shall be used at all. It does not specify what space or that any space shall be left between the wires and poles so that the complainant's employes may pass through to its wires above. It has no provision against crossing wires, and no provision when the currents shall be let on or shut off to enable the employes to handle the wires when necessary, and makes no provision whatever for the safety of the employes. It does not specify what poles shall be used, or leave complainant any voice in the premises as to whether it has any spare room upon any particular pole

or poles. It does not specify whose duty it shall be to repair poles, or in case of decay or destruction, erect new ones. And, finally, it is contended that the resolution simply sells absolutely to Sands an undivided interest in the poles at such price as the council may thereafter fix, with the absolute right to use such as he may need, just as he pleases, and leaves the complainant helpless in his hands.

Defendant Sands claims that there was a committee of the council empowered to act in the matter after this resolution was passed, and that such committee could fix the manner of the use. This committee was known as the "street lighting committee," but nothing appeared of record in the proceedings of the Common Council empowering this committee to act or make any regulations for the use of the poles. It is contended, further, by defendant Sands, that after the resolution was passed he called upon the president of the complainant company, and was told by him to designate any poles he wished to use for public lighting, and he could use them, and that he would be charged in proportion to the number of wires used; and that acting under this, and the direction of the committee, he attempted to put up the cross-arms, when he was stopped by the injunction. There is no claim, however, on the part of the defendant that any arrangement was consummated with Mr. Hart, president of the company, as to the manner of the defendant's use of the poles, or the manner of stringing the wires. The committee of the council who directed Sands to go on with the work and use the complainant's poles do not pretend that any regulations were adopted or the manner of their use fixed by the committee, or how many wires were to be placed on the poles, or where located.

There can be no doubt that under the charter provisions the Common Council had the power to pass the ordinance above set out, and to grant the franchise to the complainant, with the resolutions therein contained. After this was done, however, and the complainant had

erected the poles the council could not, by this resolution, do what was attempted to be done here, without first fixing in a definite way the use which it was attempted to confer upon defendant Sands. The power to make such reasonable regulations for the use of the poles is lodged by the statute in the council, and cannot be delegated to a committee. *Chilson v. Wilson*, 38 Mich. 267; *Vincent v. Board of Supervisors*, 52 id. 340. The language of the statute is that "such corporation shall have power to lay, construct, and maintain conductors for conducting electricity through the streets," etc., "with the consent of the municipal authorities thereof, under such reasonable regulations as they may prescribe." This language means that the municipality itself shall make the regulations, and such regulations shall be reasonable. The municipality acts through the Common Council, and it is for that body to make the regulations. No regulations were ever made by it in this matter, and whatever regulations were attempted to be made were ordered by the committee. An ordinance or regulation, to be void for unreasonableness, must be plainly and clearly unreasonable. *White v. Kent*, 11 Ohio St. 550; *Neier v. Railway Co.*, 12 Mo. App. 25. It is apparent from what has been stated, however, that the regulations claimed to have been made by the committee for the use of complainant's poles by Sands were unreasonable, and the complainant cannot be held by their terms. By the power given to Sands under them he became possessed of absolute dominion over the poles, to the utter exclusion of the complainant, and in entire disregard of its rights.

The court below, we think, was in error in dismissing complainant's bill and dissolving the injunction. The injunction should have been continued until the city, by its council, had fully investigated the matter, and made such regulations for the use of the poles by Sands as the circumstances of the case demanded. The city had granted this franchise to the complainant, and the complainant, acting under the powers conferred, had expended large

sums of money in erecting poles and stringing its wires. The power granted to Sands by the committee in effect transferred the property rights of complainant in the poles to Sands, and left the complainant at his mercy. The Common Council also owed a duty to the employes of both complainant and Sands to make such regulations for the joint use of the poles that the lives of such persons should not be endangered. Public policy requires this. Electricity is a dangerous current, unless confined in proper channels; and the lives of employes are not safe unless they are advised what are live and what are dead wires at all times. If two opposing companies can with safety use the same poles, then such regulations must be made that lives and property shall not be endangered; if regulations cannot be made, so that lives and property can be protected by the use of the same poles by opposing companies, then any provision for such joint use would be most unreasonable. We are not able to say from this record that a joint use cannot be made of the poles by Sands and the complainant. If such joint use appeared conclusively to us to be dangerous, we should unhesitatingly set aside the ordinances and resolution granting to Sands any use of complainant's poles. We are not, however, satisfied upon that point, and shall in the present case only decide the resolution unreasonable, as not providing proper regulations for a joint use.

The second point raised by complainant's solicitors is not well taken. It is apparent that under the charter of Manistee the Common Council may permit parties the use of the streets for gas or water pipes, or for the purpose of erecting and maintaining poles for the purpose of telegraph and telephone service or electric lighting. Section 1, subd. 34, chap. 11, of the charter* provides:

The council shall have authority to enact all ordinances and to make all such regulations consistent with the laws and Constitution of the State as they may deem necessary for the safety, order and good government of the

* Act No. 48, Laws 1882.

city and the general welfare of the inhabitants thereof ; but no exclusive rights, privileges, or permits shall be granted by the council to any person or persons, or to any corporation, for any purpose whatever.

Chapter 22, § 1, gives the council control of all public highways, bridges, streets, avenues, alleys, and public grounds within the city, and provides that it shall cause the same to be kept in repair, and free from nuisance. Section 13 of said chapter gives the city the right to light the streets and public places and regulate the setting of lamps and lamp-posts therein, and protect the same. Section 3 of chapter 20 confers authority upon the council to lay out, establish, improve, and light the public grounds and parks within the city ; and section 15, chap. 22, gives the council control over the placing of telegraph and other poles in or over the streets.

It is contended, however, that the act under which the complainant is organized limits the right of the council to permit electric light poles to be placed upon any of the public streets *to the use of a corporation to be organized under that statute*. Section 10 of the act has been quoted above. It provides that such corporation "shall have power to lay, construct, and maintain conductors for conducting electricity throughout the streets," etc., "*with the consent of the municipal authorities thereof.*" This was not intended by the Legislature to limit the right of the municipal authorities to grant the privilege to any other than such a corporation. The Legislature has authorized the formation of such corporations, and empowers the municipal authorities to deal with them ; but it was not intended to compel the municipal authorities to deal with such corporations against their will. It is true that the highways of the State, including streets in cities, are under the paramount control of the Legislature, and all municipal control over them is derived from it. 2 Dill. Mun. Corp. § 680. The Legislature has the exclusive right to say to whom any rights in the said streets shall be granted, and the municipality can only grant such rights under the powers conferred upon it by the legislative department of the

government. The cases cited by counsel for complainant go to the extent that, in the absence of power granted by the Legislature to a municipality, such municipality cannot confer upon either an individual or a corporation power to use the same. *Telegraph Co. v. Newark*, 49 N. J. Law, 344 (8 Atl. Rep. 128).

It is said that great evils would result if these privileges were granted individuals, instead of corporations organized for such purposes. This is a matter of legislative concern, and not a question for the courts. But we do not see how such evils can result if such privileges are permitted to individuals. It is the concern of the municipality to light its streets by the cheapest and best attainable means, and the municipal authorities must have some discretion in determining the merits and reliability of the various methods of reaching that result. *City of Detroit v. Circuit Judge*, 79 Mich. 384.

The power granted the city of Manistee, by its charter, over the streets for lighting purposes and the erection of poles, carries with it the right to make contracts for such purposes with individuals as well as with corporations organized for such purposes.

For the reasons pointed out, however, the decree of the court below must be reversed, and decree entered here in favor of complainant, restraining defendant Sands from using its poles until the city, by its council, shall, after notice to the parties interested, adopt suitable rules and regulations for such joint use. The complainant will recover against defendant Sands the costs of both courts.

The other Justices concurred.

NOTE.—See note to *St. Louis v. W. U. Tel. Co.* (second decision), *post*.

**ATTORNEY-GENERAL, EX REL. BOARD OF GAS & ELECTRIC
LIGHT COMMISSIONERS V. WALWORTH ELECTRIC LIGHT
& POWER COMPANY.**

Supreme Judicial Court of Massachusetts, June 24, 1892.

(157 Mass. 86.)

ELECTRIC LIGHT WIRES.—MUNICIPAL CONTROL.—INJUNCTION.

A statute forbidding the erection of electric light wires in streets without consent of municipal authorities cannot be evaded (1) by the use of wires laid without license by a predecessor; or (2) by having the customers own the wires where they cross streets; or (3) by having the customers put up the entire wires.

APPLICATION for injunction to restrain the use of certain wires for electric lighting purposes.

Facts stated in opinion.

C. A. Snow and E. W. Burdett, for the plaintiff.

E. R. Champlin, for the defendant.

HOLMES, J.: This is an information by the Attorney-General, under the Sts. of 1887, ch. 382, and 1885, ch. 314, § 13, to restrain the defendant from maintaining or using certain wires over which the defendant furnished electricity for lighting. The defendant was incorporated since the passage of the St. of 1887, ch. 382. By § 3 of that act:

In any city or town in which a company is engaged in * * * the manufacture and sale of electric light, no other company shall lay or erect wires over or under the streets, lanes and highways of such city or town, for the purpose of carrying on its business, without the consent of the mayor and aldermen, etc.

There were companies in Boston engaged in the manufacture and sale of electric light at the date of the act, and

the defendant has not obtained the consent required by it. The wires in question are of three classes: first, two wires in a tunnel under Hawley street, laid without license by a predecessor of the defendant, and now belonging to the defendant; secondly, wires put up by the defendant, and still belonging to the defendant, throughout their entire length, except where they cross the streets, the portions which cross the streets having been sold by the defendant to its customers, or put up by the defendant for its customers in some instances, in others having been put up by the customers, these devices being intended by the parties to evade the statute; thirdly, wires put up by customers, and belonging to them, the intent presumably being again to evade the statute. The question is whether these wires fall within the statute.

The Legislature may think that a business like that of transmitting electricity through the streets of a city necessarily must be transacted by a regulated monopoly, and that a free competition between as many companies and persons as may be minded to put up wires in the streets, and to try their luck, is impracticable. Without wasting time upon useless generalities about the construction of statutes, it is enough to say that the statute before us had that consideration in view, and must be construed accordingly. We agree that we cannot supply a *casus omissus*. But the fair scope and meaning of the words used, and the number of cases included, will vary more or less according to the purpose of the act. To take an example a little different from these examples before us, we think it plain that, if somebody else put up a wire, and then the company bought it, and used it for the business of furnishing and selling electric light, the case would be within the meaning of the words used, although the company did not erect the wire in a literal sense, or cause it to be erected. In other words, the reason why the statute forbids laying or erecting wires is to prevent wires being maintained in the streets. If they vanished as soon as erected, the Legislature never would have prohibited the mere act of

putting them there. But when the Legislature forbids erecting wires for the express purpose of preventing their being maintained, it impliedly forbids their being maintained. We are of opinion that the case is not changed by the wires having been laid by a predecessor who was not within the prohibition of the statute, if that be the fact as to the wires in Hawley street.

We are of opinion that similar reasoning applies with greater force to the use of the second class of wires by the defendant. It seems to us quite out of the question to say that a company may escape the prohibition of the statute by turning over to a customer so much of each wire as crosses street, and then continuing to use the wire. If it is forbidden to erect, it is forbidden to use wires which it has erected. And it is within the words of the act, as well when it erects a wire technically, as a servant of its customer, with intent to use the wire for the purposes of its business, but to evade the act, as when it erects it on its own behalf. We agree that we cannot order wires to be taken down, the owners of which are not before us. But we can order the defendant not to use them.

With much more hesitation we have come to the same conclusion about the wires put up by customers. If a use of them by the company for the purposes of its business is permitted, the statute is made nugatory by an easy evasion. It was suggested that in some of these cases the company did not sell electric light, because it did not own the device at the customer's end by which the electricity furnished took the form of light,—that the company only sold electricity. We think it quite clear that the Legislature took no such nice distinctions, and that a wire which is prohibited when used to furnish electric light is prohibited equally when used to furnish electricity for the purpose of conversion into light at the end of the wire.

Injunction accordingly.

**HERSHFIELD ET AL., Appellants, v. ROCKY MOUNTAIN
BELL TELEPHONE COMPANY, Respondent.**

Montana Supreme Court, May 2, 1892.

(12 Mont. 102.)

TELEPHONE POLES IN STREETS.—MUNICIPAL CONTROL.—ABUTTING OWNERS.

The use of streets for telephone purposes, in a reasonable manner and to a reasonable extent, is just and proper, when sanctioned by the public through its duly authorized municipal agents.

Power conferred by charter upon the Common Council of a city, to license, tax and regulate telephone companies, carries with it power to grant permission to maintain the requisite appliances in streets.

An abutting owner, not owning the fee of the street, and suffering or being threatened with no inconvenience peculiar, unnecessary, or greater than that caused to others by erection of similar poles, held not entitled to injunction restraining the erection of telephone poles pursuant to municipal authority.

Cases of this series cited in opinion: *Julia Building Ass'n. v. Bell Teleph. Co.*, vol. 1, p. 801; *Pierce v. Drew*, vol. 1, p. 571; *Irvin v. Gt. So. Teleph. Co.*, vol. 1, p. 709; *Taggart v. Newport St. Ry. Co.*, vol. 3, p. 306.

APPEAL from judgment of District Court, Lewis and Clarke county. Facts stated in opinion.

McConnell & Clayberg, for appellants.

H. G. McIntire, for respondent.

HARWOOD, J.: Appellants brought this action "on their own behalf, and on behalf of others similarly situated," to obtain an injunction permanently restraining respondent from erecting a certain telephone pole at the place herein-after described, in the city of Helena.

Respondent demurred to the complaint on the ground that the plaintiffs failed to allege therein facts sufficient to

constitute a cause of action, which demurrer was, upon hearing and consideration, sustained, and the temporary injunction dissolved. Plaintiffs elected to rest upon their complaint without amendment, and judgment was therefore entered in favor of defendant, from which plaintiffs appeal, assigning error in sustaining said demurrer, and contend that sufficient facts are alleged to constitute a cause of action.

The facts sufficient for the discussion of the points considered on this appeal, as found in the complaint, are alleged substantially as follows: That defendant is a corporation organized and existing under the laws of the Territory of Utah, and is doing business in the city of Helena, county of Lewis and Clarke, and elsewhere in this State; that said city, by ordinance No. 187, a copy of which is annexed to plaintiffs' complaint as a part thereof, granted to defendant for the term of twenty years the right to erect and maintain poles and wires, with the arms and braces necessary thereto, over and above the streets, avenues, alleys and public grounds of said city, necessary to establish and operate a telephone service therein; that, under the privilege granted by said ordinance, respondent has, by means of poles and wires, established, and is operating a telephone service in said city. Said ordinance, in addition to said grant, provides that

All of the rights hereby granted to be subject to such terms and conditions as the city council of the said city may from time to time prescribe, and expressly reserving the right to require the said company to place its wires under ground if the city shall at any time require: *Provided*, that said company shall at all times, when so requested by the city authorities, permit their poles and fixtures to be used for the purpose of placing and maintaining thereon any wires which may be necessary for the police and fire departments of said city.

Plaintiffs further allege that they are the owners of lot 7, in block numbered 30, in the original town site of the said city of Helena, being about 35 feet front on Main street, and 117 feet deep, bounded on the east by Main street, and on the south by Edwards street, upon which

lot appellants have erected a large four-story building, fronting on said Main and Edwards streets, which building is used as a business block for the purpose of banking and offices.

That, prior to the entry of said town site of the city of Helena, the predecessors of plaintiffs in interest in said premises were inhabitants of said city, and occupied and possessed said premises as the owners thereof, against all others except the United States of America; that as such occupants, possessors and owners they established and laid out in front of said premises a street designated as "Main street," also another designated as "Edwards street," for the ordinary use and purpose of streets and highways; that while the said premises were so occupied and possessed by the predecessors in interest of the plaintiffs, and while said streets were so laid out, established and used, the probate judge, acting as county judge of the county of Lewis and Clarke, as by law provided, did in the year 1869 enter and acquire title to the said land in question, among other lands, from the government of the United States, as the town site of said city of Helena, in trust, for the use of the inhabitants of said city; "that thereafter the said probate judge, in discharge of his trust in that behalf, conveyed the premises hereinbefore described to the predecessors in interest of these plaintiffs, describing the same as bounded by said Main and Edwards streets, who in like manner conveyed the same to plaintiffs and their grantors; by reason whereof these plaintiffs became and are the owners of the fee in said premises, and to the center of said Main and Edwards streets, subject to the ordinary use and purpose thereof as streets and highways;" that since the entry of said town site for the use of the inhabitants of said city, "and while the predecessors in interest of these plaintiffs were so the owners, seized and possessed of the premises aforesaid, they cut off from their said lot ten feet in front thereof and adjacent to said Main street, for the sole purpose of allowing the same to be used as a street and highway, for the purposes of travel, and for

the convenience and benefit of their said property, and not to the injury and detriment thereof;" that the same has ever since been solely and exclusively used for such purpose up to the time of the attempted erection of the poles, wires, and branches by the said defendant, under the pretended rights secured to it by the franchise hereinbefore set forth; that under such pretended authority granted by said ordinance, defendant has commenced the digging of a hole for the planting of a pole in the edge of the sidewalk immediately in front of plaintiffs' premises aforesaid, upon said Main street, and within said ten feet cut off by appellants from their said lot for street purposes, as aforesaid; that respondent instituted no condemnation proceedings under the laws of eminent domain of this State, whereby to obtain the right to use said land for the purpose of erecting said pole thereon; that said acts of respondent upon said land are in violation of the rights of appellants as the owners in fee thereof; that the height of said pole is forty-five feet, and arms and braces are to be attached to it, and a large number of wires are to be strung thereon, over and above said street, and immediately in front of said building of appellants, and within ten feet thereof; that the erection of said pole and arms and wires would be an injury to the freehold of appellants; that, for a period of two years last past, defendant has maintained a pole on the other side of Edwards street, opposite the point where the one in question is to be placed, which defendant proposes now to discontinue; "that, as plaintiffs are informed and believe, said pole (as formerly placed) is at a proper and convenient place for said company, and is sufficient to carry and maintain all necessary wires of said company;" that there is no necessity for changing the site of said pole as proposed, but that all business of defendant can be as conveniently conducted with said pole at the former place.

There are no allegations in the complaint showing that in the proposed planting of said pole at the place described respondent had located the same contrary to the

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permission obtained from the city authorities; nor that by the arrangement of the poles set up by respondent under such permission there has been discrimination against appellants by way of locating the pole in question in such a position as to work an unnecessary disadvantage or inconvenience to the use of plaintiffs' property; nor that the same might be located in a different position in front of their lot, with less inconvenience to them in the use of their property and to the public, and at the same time answer all necessary purposes of defendant in establishing and operating said telephone service. In short, there are no facts alleged showing a peculiar or unnecessary or greater inconvenience to plaintiffs or their property by the erection of said pole at the place proposed than results to others in like situation as to poles planted on said street.

There is no doubt, considering the nature of the matter under discussion, that a system of poles could be so arranged along the streets as to answer the necessity of respondent's business, and avoid placing one in the street in front of plaintiffs' lot, by placing the necessary poles in front of other lots. The allegations of the complaint bring to the court the general proposition as to whether defendant may, under the authority granted by said city, erect the necessary appliances for a telephone service in the streets along the front of plaintiffs' lot, without any peculiar, unnecessary, or greater inconvenience to plaintiffs at that place than to others in front of whose lot a pole is erected.

Appellants contend that they have alleged facts showing that they own the freehold estate not only in their said lot, but also to the center of the said streets adjoining; but, apparently conceding that they can recede somewhat from this proposition, they contend that, if that is not sustained, they still have shown that they own the fee in that portion of the street where said pole is about to be erected, namely, within ten feet of the front of their said lot on Main street. Much emphasis is laid upon this point by appellants' counsel. Inasmuch as this is an action to prevent the erection of said pole under the authority granted by the

city, it is no doubt important to consider whether plaintiffs own the fee in the street at that point, although, in actions by abutting lot owners to recover damages alleged to have resulted from the erection of such poles, or street railways, or other erections in the street, it has been questioned in the more recent cases whether the fact that the lot owner also owns the fee in the street is of so great importance as formerly supposed. 2 Dillon on Municipal Corporations (4th ed.), §§ 657, 658, 698, 705, and cases cited. We think, with appellants' counsel, that in a case like this, however, where the object is to prevent the erection of said pole, without condemnation proceedings under the law of eminent domain, the ownership of the fee in the street is a material question, and we will therefore examine the complaint to see whether the facts alleged are sufficient to show that plaintiffs own the fee in the land at the place where said pole is about to be erected.

* * * * *

[The matter here omitted consists of a discussion of the question above proposed. The court conclude that "there are no allegations of plaintiffs' complaint whereby it is shown that they or their predecessors in interest ever acquired the title in fee to any part of the land occupied by Main street at the place in question."]

Under this state of facts we are of opinion that, if the municipal authorities of the city of Helena had power to authorize the establishment of a telephone service for the use and convenience of the inhabitants thereof, and it was proper to use the streets for that purpose to the extent of placing necessary poles and wires therein, the plaintiffs, not owning the fee in the street, would not be in a position to prevent such use on the ground that it was imposing an additional servitude upon an easement granted by them; for it does not appear from the allegations of the complaint that they, or their predecessors in interest, ever acquired the fee in the land occupied by the street. 1 High on Injunctions, § 637; Lewis' Eminent Domain, § 172; Mills on Eminent Domain, § 14. It cannot be successfully ques-

tioned that the telephone is an appliance of great public utility to the inhabitants of towns and cities, and its use can be extended far beyond the limits of urban settlements. The use of this means of communication, as well as the telegraph, was considered of so much importance to the people, it was provided in the Constitution that

Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct or maintain lines of telegraph or telephone within this State, and connect the same with other lines; and the legislative assembly shall, by general law of uniform operation, provide reasonable regulations to give full effect to this section. Art. 15, § 14.

Is it germane to the proper use of streets to allow such poles to be set in and wires strung over them as are necessary to set in operation this service? Upon this question Mr. Justice NORTON, speaking for the majority of the court, in the case of *Julia Bldg. Assoc. v. Bell Tel. Co.*, 88 Mo. 269 (57 Am. Rep. 398), reasoned as follows: "If it be true, as laid down by the authorities herein cited, that when the public acquires the right to a street, either by dedication, grant, or condemnation, the municipality has the power to appropriate it, not only to such uses as are common and in vogue at the time of its acquisition, but also to such new uses as advanced civilization may suggest as conducive to the public good, the conclusion is inevitable that the use of Sixth street in the manner and for the purposes proposed is allowable, for it cannot with any show of reason be denied that the means these appliances would afford for the instantaneous transmission of communications for the transaction of business, without resorting to the slower and common methods of bearing them, would be conducive to the public good, and make the street by these means serve one of the chief purposes for which it was dedicated."

As to the effect of the telephone in relieving the street of some portion of the throng which would otherwise pass over it, the same judge observes as follows: "These streets are required by the public to promote trade and facilitate

communications in the daily transactions of business between the citizens of one part of the city with those of another, as well as to accommodate the public at large in these respects. If a citizen living and doing business on one end of Sixth street wishes to communicate with a citizen living and doing business on the other end, or at any intermediate point, he is entitled to use the street, either on foot, on horseback, or in a carriage or other vehicle, in bearing his message. The defendants in this case propose to use the street by making the telephone-poles and wires the messenger to bear such communications instantaneously, and with more dispatch than any of the above methods, or any other known method of bearing oral communications. Not only would such communication be borne with more dispatch, but, to the extent of the number of communications daily transmitted by it, the street would be relieved of that number of footmen, horses, or carriages."

In this view (and it seems to be very practical) the telephone pole would in fact facilitate passage upon the street, for it would constantly keep out of it a hundred or perhaps a thousand fold more of incumbrance than it brings in, by enabling persons to communicate without physically passing through the street to meet one another.

We think that to use the street in a reasonable manner, and to a reasonable extent, for this purpose, is just and proper, and is within the uses to which the street may lawfully be put, when such use is sanctioned by the public through its duly-authorized municipal agents. *McCormick v. District of Columbia*, 4 Mackey 396 (54 Am. Rep. 284); *Pierce v. Drew*, 136 Mass. 75; *Irwin v. Great Southern Tel. Co.*, 37 La. An. 63; *Taggart v. Newport St. Ry. Co.*, 16 R. I. 668; *People v. Kerr*, 27 N. Y. 188.

Appellants contend that the city council possessed no power to grant said company the privilege mentioned, and that such attempted grant of said privilege was consequently void. It is provided in the city charter (section 44, p. 178, Sess. Laws 1883, and section 44, p. 18, city charter

and ordinances) that "the city council shall have power to license, tax, and regulate * * * street railways, water companies, * * * electric light companies, telephone companies, gas companies, and all other branches of business."

The grant of this power, in our opinion, carried with it the necessary concomitants of its exercise; and that to license and regulate the telephone service, it was necessary to grant permission to use the appliances requisite thereto. The Constitution of the United States provides that Congress "shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Mr. Justice FIELD, expressing the opinion of the United States Supreme Court in the case of *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 203, in referring to this "power to regulate," said: "The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged." 1 Dillon on Municipal Corporations, §§ 114, 357-360, and cases cited.

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Affirmed.

BLAKE, C. J., and DE WITT, J., concur.

NOTE.—See note to *St. Louis v. W. U. Tel. Co.* (second decision), *post*, VOL. IV—6.

HERMAN F. NEWMAN v. THE VILLAGE OF AVONDALE.

Hamilton County (O.) Common Pleas, March, 1894.

(81 W. Bul. 123.)

TELEGRAPH POLES AND WIRES IN STREET.—MUNICIPAL CONTROL.—CONSTRUCTION OF ORDINANCE.—INJUNCTION.

A company having obtained municipal permission for itself and its assigns, to erect poles and string wires in streets for telegraph and telephone lines, has a right to license another party to string wires upon its poles for the purposes aforesaid.

A person engaged in "salvage and notification business" i. e., furnishing information to subscribers partly by telephone and partly by a system similar to that of telegraphy, maintains wires "for telegraph and telephone lines."

An ordinance granting privileges, containing the word "assigns" in the title but not in the body of the ordinance, construed, in accordance with manifest intention, to confer the rights mentioned in it both upon the grantees and their assigns and licensees.

Injunction granted, at suit of licensee to prevent municipal corporation from cutting its wire.

Case of this series cited in opinion: *State, Hudson Teleph. Co., Pros., v. Jersey City*, vol. 2, p. 183.

HEARD on motion to dissolve temporary restraining order.

S. N. Maxwell, for plaintiff.

Walter Granger, for the village.

HOLLISTER, J.: The village of Avondale, on July 8, 1889, granted to the City & Suburban Telegraph Company, a corporation hereinafter called telephone company, certain rights and privileges contained in an ordinance regularly passed, entitled: "An ordinance, No. 647, to grant permission to the City & Suburban Telegraph Association, a corporation organized under the laws of Ohio, or their assigns, to erect telegraph lines and maintain the same." By

section 1 it is ordained by the council of the village of Avondale, two-thirds of all the members concurring, that the City & Suburban Telegraph Association have permission to erect poles and string wires for telephone and telegraph lines, and maintain the same in the streets of the village, to be placed and maintained under the direction of the committee on improvements. There are several provisions and conditions relating to the manner of erecting poles, change of location of poles, and terms under which trees, etc., may be cut at points of interference, and a provision of reservation of four inches of the top of each pole for the exclusive use of the fire and police telegraph.

The telephone company complied with the terms of the grant, so far as appears, erected its poles, strung its wires, and was, at the time of the present controversy, carrying on its telephone business in the village.

On November 1, 1893, the telephone company made an agreement with the plaintiff termed a "pole license," by which he, in consideration of a certain payment to it, was granted the right as licensee "to attach and maintain, at his own expense and risk," upon the poles of the licensor, his wires, for the purposes hereinafter set forth, together with the necessary insulators and fixtures, subject to the regulations of the licensor, and in such a manner as not to conflict with the licensor's use of the poles and fixtures, nor interfere with its wires or the use thereof, nor endanger the lives of the licensor's employes or patrons, or its or their property. The agreement is terminable at the will of either party at any time upon thirty days' notice to the other, and there is a stipulation that no use of the poles and fixtures, however extended, shall create or vest in the licensee any ownership or property in them. The license is not assignable, and must be and was executed by the general manager of the telephone company.

It appears that when the plaintiff applied for permission to use the poles, the manager of the telephone company supposed that he had theretofore obtained authority to string his wires from the village council. This was not

true, for, after trying some years in vain to secure a grant, he concluded that he could accomplish the same end through the telephone company. Having acquired permission from it to use its poles for his purposes, he attached a single wire thereto, with a return metallic circuit, which, through connections therefrom to the residences of his patrons, he proposed to use in carrying on what is called a salvage and notification business. Briefly, the use to which the wires were to be put was to notify his subscribers at their residences by means of electric signals similar to the Morse system of telegraphing, and by telephonic communication, of fires affecting their interests in the city of Cincinnati, or in the village, and generally to give notice of emergencies requiring immediate attention. At the time he obtained this permission, there was pending before the council an ordinance granting to the Avondale District Telegraph Company extensive rights, including the erection of poles in the streets of the village. This ordinance was passed December 26, 1893. Pending the passing thereof, the council, on December 12, resolved that plaintiff's wires were a detriment to the public use of the streets, and that unless the plaintiff removed them within three days, the village marshal should cause them to be taken down, employing such help as he needed for the purpose, and on the twenty-sixth the clerk was directed to notify the marshal to take the wires down forthwith.

Thereupon the plaintiff, on December 27, filed this suit, and obtained a temporary restraining order, to dissolve which is the object of this motion. Defendant files an answer, averring in substance that the grant to the telephone company was for telephone purposes only, to be used by it alone; that the telephone company had no legal right to permit its poles to be used by another; that its business and plaintiff's are not similar in any respect, and that the grant does not cover plaintiff's business. There are other allegations of fact, either embraced in the statement of the case, or immaterial. By way of cross petition, the claim is made that plaintiff's is neither a telephone nor

telegraph company; that his business is a private enterprise for his own gain; is a public nuisance, and is unlawful; and the prayer is for a perpetual injunction against his use of the highways of the village for that purpose.

The Legislature has granted to municipal corporations, to be exercised by the council, the care, supervision and control of all public highways, streets and avenues within the corporation, and directs the council to cause them to be kept open and in repair, and free from nuisance. Rev. Stat., sec. 2640.

If the plaintiff had no authority to string his wires in the street, he would, without doubt, now be maintaining a nuisance in the nature of a purpresture, which, if made upon the property of an individual, would be a trespass. Wood on Nuisances, sec. 77, and cases cited.

The council has charge of the entire street in its full length and width, and, doubtless, over interferences, however slight, with its upward and downward extent. The stringing of a wire without authority, is, in legal contemplation, an encroachment upon a public right, and council has authority to abate the evil as a public nuisance; and the fact that the purpose of the unauthorized use of the streets may be useful or of no injury makes no difference. Wood on Nuisances, secs. 19, 250; *People v. Vanderbilt*, 28 N. Y. 396.

It will be noticed that no private rights of abutting property owners are directly in question in this case. The legislature has given the right to erect poles, string wires, etc., to magnetic telegraph companies. Rev. Stat., 3454. They may construct, own, use and maintain any line of magnetic telegraph whether described in their original articles of incorporation or not. Rev. Stat. 3455; and may appropriate land for its purpose. Rev. Stat., 3456. And when such lands are subject to the easement of a public street or public way, the mode of use shall be agreed upon between the company and the municipal authorities, or, if they can not agree, the probate court shall direct in what mode the use of the streets shall be exercised

Sec. 3471 provides that "the provisions of this chapter shall apply also to any company organized to construct any line or lines of telephone ; and every such company shall have the same powers, and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies."

The telephone company, under these sections, had the right to, and did have the mode of its use of the streets of the village fixed by ordinance. It has authority to use wires for telephone and telegraph purposes, and to erect poles for their suspension. Through those wires, the number of which are not limited by the ordinance, are transmitted electric currents, carrying vibrations of sound. The public use of the streets is affected by the construction of poles and wires, and not by the nature of the sounds through the wires, whether of voices or otherwise.

The use of wires required by plaintiff's business is exactly the same. His wires carry vibrations and sounds, both of a telephonic and telegraphic character.

If this is so, it follows that such use is included in the grant to the telephone company, and the village could not complain if that company carried on the notification and salvage business, and suspended wires for that purpose. It is true, that as a general rule grants of power by a municipality are personal in their nature, to be exercised by the grantee alone ; yet it is also true that the grant, so called, to the telephone company was in lieu of what it could have accomplished through the probate court, had council been unwilling to pass the ordinance.

The agreement ought to give it no less than it could have obtained through that court. In either event, it would have acquired a species of property, after availing itself of the right and making expenditures in its development, which it could have passed to its successors and assigns.

It has been held that where streets have been designated by the authorities upon which a telephone company may erect poles, and the company has expended money in erecting them, the permission can not be revoked. *Hudson*

Telegraph Co. v. Jersey City, 49 N. J. L. 303. Vested rights when once acquired can not be rendered nugatory by subsequent legislation. The principle has been recognized since the Dartmouth College case. It might therefore be argued that the word "assigns" was not necessary in the ordinance to give the telephone company full power to pass its property and franchise to its successors and assigns.

But whether or not, on that ground, the telephone company has become possessed of such an interest as it may assign need not be decided; for, taking up the ordinance, it appears that its title states its object to be, to grant to the telephone company or its assigns certain rights. The rest of the ordinance runs in favor of the telephone company alone.

The title of an act is regarded as of some consequence by the Supreme Court. In *State v. Pugh*, 43 Ohio St. 98, 113, the language of BURNET, J., in *Burgett v. Burgett*, 1 Ohio, at p. 480, on that subject is quoted: "The title is framed in the same manner as the bill, and is sanctioned by the vote of both branches of the Legislature; we may, therefore, consider it as explanatory of the object of the law."

After stating the object of the ordinance, the council proceeds to name the conditions on which the grant is made. The beneficiary being fixed by the title, it no longer becomes important to emphasize that feature; hence, "or its assigns" became in the minds of council a matter of no consequence for the body of the ordinance. In *Wilber v. Paine*, 1 Ohio, 25, 225, the rule is laid down that such a construction of a statute should be given "as may appear best calculated to advance its object by effectuating the design of the Legislature."

Again, it is held that the whole should be given effect, and one part should not be allowed to defeat the other. *Patton v. Pickaway County*, 2 Ohio, 395, 397. And "no words should be rejected if the statute will admit of a rational and consistent construction without rejecting it." *Allen v. Parish*, 3 Ohio, 187, 193. The real intention will

always prevail over the literal sense of terms. *Medical College v. Ziegler*, 17 Ohio St. 52.

In *Burgett v. Burgett*, *supra*, at page 481, the court say: "The intention of the law-makers may be collected from the cause or necessity of the act, and statutes are sometimes construed contrary to the literal meaning of the words. * * * The letter is sometimes restrained, sometimes enlarged, and sometimes the construction is contrary to the letter." See, also, *Strong v. Lehmer*, 10 Ohio St. 93, 98.

It seems to me quite clear that the intention of council was to give the grant to the telephone company or its assigns. Nor are these rules objectionable in that the facts in the several cases were unlike those under consideration, for the Supreme Court has expressly declared that when the rule is clear and comprehensive, it is not to be limited to the particular instances which may be supposed to have led to its adoption. *Goshorn v. Purcell*, 11 Ohio St. 641, 649.

It is claimed that "or" does not mean "and;" that the telephone company could not be operating a part of its powers, and at the same time have assigned another part to the plaintiff or anybody else. The interchange of the disjunctive and the conjunctive, when the sense requires it, is frequently made. *Wert v. Clutter*, 27 Ohio St. 347, 350; *Attorney-General v. Covington*, 27 Ohio St. 102, 115. If the company assigned all its powers, its assignee would have taken everything it had in either case. It is difficult to see why it should not assign a part and retain a different part.

But the plaintiff claims that if he is not an assignee in the strict legal sense of the word, he has at least a right partaking of all the essential elements of a license. It is revocable at pleasure on thirty days' notice; the telephone company parts with no right or property, and the plaintiff holds at the will of the licensor. *Fuhr v. Dean*, 26 Mo. 116; *Bartlett v. Prescott*, 41 N. H. 493; 15 Ill. 397, 399; 15 Wend. 380.

The Century Dictionary defines a license to be "a right given by some competent authority to do an act which, without such authority, would be illegal; an authority to do a particular act or series of acts on another's land without possessing any interest therein." In patent law it is considered "a grant or permission to patent an invention, or to use the thing patented, which leaves the interest of the patentee just as extensive as it was before." Curtis on Patents, sec. 211.

It differs from an easement, in that the latter is a servitude which can not be avoided or annulled by a conveyance of the subject thereto. *Wallis v. Harrison*, 4 Mees. & W. 538; *Hills v. Miller*, 3 Paige, 253, 257. A conveyance of the interest on which a license operates destroys the license. *Harris v. Gillespie*, 6 N. H. 9; *Cook v. Stearns*, 11 Mass. 533; *Foot v. R. R. Co.*, 23 Conn. 214.

A sale of its property and franchises by the telephone company would not therefore be encumbered by this license, and its assigns would owe no obligation to the licensee. The plaintiff's estate is less than that of an assignee. The greater always include the less. The company permits plaintiff to do that which it could do itself. The grant to it or its assigns gave entire dominion to the company over its poles and wires. Plaintiff's wires impose no burden on the streets not included in the grant. It can make no difference to the village that the company is willing to farm out to another that which it had a perfect right to do itself. Perhaps it prefers the certain income from pole rentals to the labor and uncertain results of embarking in a branch of the same business carried on by exactly the same use of its wires to which they are now put. The village parted with its dominion when it made the grant. No legal right belonging to it is infringed by any operation covered by the powers expressly granted, and the company could legally do with its own as it pleases, so long as it kept within the power conferred.

If any injury occurs through the negligence of the

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licensee, the licensor is still liable. 26 Vt. 717; 80 N. Y. 27; 5 Wall. 90; 17 Wall. 445.

But whether the plaintiff is an assignee in a restricted sense, or a mere licensee, I am of opinion, while appreciating the difficulties of the case, that he has not interfered with any legal right which the village has.

Decree accordingly will be entered.

NOTE.—See note to *St. Louis v. W. U. Tel. Co.* (second decision), *post*.

CITY OF ALLENTOWN v. WESTERN UNION TELEGRAPH
COMPANY, Appellant.

Pennsylvania Supreme Court, March 23, 1892.

(148 Pa. 117.)

TELEGRAPH POLES AND WIRES.—MUNICIPAL CONTROL.—LICENSE.

A municipality has a right, and it is its duty, to supervise and control the erection and maintenance of telegraph poles and wires within its limits. This is within its police power; and as an incident to it, it may require a license fee based on the number of poles and length of wires. The amount of the fee is discretionary with the municipal authorities, and only in case of abuse of discretion will the courts interfere. One dollar per annum per pole, and \$2.50 per mile of wire, is not unreasonable as a license fee. Case of this series cited in opinion: *W. U. Tel. Co. v. Philadelphia*, vol. 2, p. 98.

ACTION for recovery of license fees. Appeal by defendant from judgment of Court of Common Pleas, Lehigh county.

R. E. Wright (of *R. E. Wright's Sons*), for appellant.

John Rupp, City Solicitor, for appellee.

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Per CURIAM: We agree with the learned judge of the court below that the case is ruled by *Western Union Telegraph Co. v. Phila.*, 22 W. N. 39, where it was held that a municipality has a right, and it is its duty, to supervise and control the erection and maintenance of telegraph poles and wires within its limits. Hence, where a municipality imposed by ordinance a license fee of \$1 per annum on each pole, and \$2.50 per annum on each mile of wire within its limits, the court declined to rule that the fee so charged was so obviously unjust as to authorize a revision of the action of the city councils. In the case in hand it appears that the city of Allentown enacted an ordinance requiring every telegraph, telephone or electric light company's poles in the city of Allentown to be inspected by the police department, and that the same should be licensed, and requiring a fee of \$1 each year to be paid for each pole. This ordinance was in the exercise of the police power of the city, and the only question was whether it was a reasonable exercise of such power. The amount of the license fee in such cases rests with the city councils in the first instance. It is only where such discretion has been abused that we are justified in interfering. We cannot say that this discretion has been abused in this instance, or that the license fee is unreasonable.

Judgment affirmed.

NOTE.— In *City of Chester v. Philadelphia, Reading & Pottsville Telegraph Company*, decided by the same court, at the same time as the above, and being a case of the same nature, the following is the opinion in full:

Per CURIAM: This case is ruled by *Telegraph Co. v. The City of Philadelphia*, 23 W. N. C. 89, and *City of Allentown v. Western Union Telegraph Co.*, decided herewith.

Judgment affirmed.

Both these cases are cited in the following case.

See note to *St. Louis v. W. U. Tel. Co.* (second decision), *post*.

**THE CITY OF PHILADELPHIA, Respondent, v. THE POSTAL
TELEGRAPH CABLE COMPANY AND THE MERCHANTS'
TELEGRAPH COMPANY, Appellant.**

N. Y. Supreme Court, General Term, First Department, Dec., 1898.

(67 Hun, 21.)

**TELEGRAPH.—MUNICIPAL LICENSE FEE.—INTERSTATE COMMERCE.—CON-
STITUTIONAL LAW.**

A municipal ordinance, imposing a license fee upon telegraph companies, based upon the number of poles and miles of wire in the streets, is a valid exercise of police power.

It is not repugnant to the post-roads act of Congress, to the interstate commerce provisions of the federal Constitution or the provision in the fourteenth amendment thereto, which prohibits a State from depriving any person of life, liberty or property without due process of law, or denying to any person the equal protection of its law.

Cases of this series cited in opinion: *W. U. Tel. Co. v. Attorney-General of Mass.*, vol. 2, p. 57; *Am. Rapid Tel. Co. v. Hess*, vol. 3, p. 142; *Leloup v. Port of Mobile*, vol. 2, p. 79; *W. U. Tel. Co. v. Pendleton*, vol. 2, p. 49; *People v. Squire*, vol. 2, p. 176; *W. U. Tel. Co. v. Philadelphia and Mutual Un. Tel. Co. v. Same*, vol. 2, p. 98; *Chester v. Phila., &c., Tel. Co.*, *post*; *Allentown v. W. U. Tel. Co.*, *ante*, p. 90.

APPEAL by defendant from judgment entered in New York county, upon report of referee, for over \$16,000, damages and costs. Facts stated in opinion.

R. S. Guernsey, for the appellants.

William McMichael, for the respondent.

O'BRIEN, J.: This action was brought by the city of Philadelphia to recover several annual license fees and charges imposed by city ordinances upon each telegraph pole and mile of wire in the streets of Philadelphia. The defendants conceded that plaintiff has power and author-

ity to make and prescribe ordinances for the inspection and regulation of telegraph lines within the city limits, but deny that it has either power or authority to require the payment of any fee or charge therefor, or to charge for a license, or to make any special tax upon their property, or upon each pole or wire permitted within the city limits.

This restricts the contention to the question whether a charge for such regulation and inspection is valid, and whether such a charge is an interference with the interstate commerce clause of the United States Constitution, or with the rights conferred on telegraph companies by the United States Revised Statutes (§ 5363) relating to telegraph companies and post-office service.

The appellant contends that such a tax or claim is a restraint upon the instruments of interstate commerce and communication, which is placed solely in the hands of Congress by the Constitution (art. 1, § 8, subs. 3, 18, U. S. Const.); that the United States Revised Statutes (§ 5263) grants to any telegraph company, complying with certain conditions, "the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States," etc., and that such a tax would impair and destroy the right thus conferred.

In the case of *Western Union Telegraph Company v. Massachusetts*, 125 U. S. 530, where the question was as to the right of the State to impose a tax upon the property of a telegraph company within its limits, it was held: "That the privilege conferred upon telegraph companies by the Revised Statutes (§ 5263) carries with it no exemption from the ordinary burden of taxation in a State within which they may run or operate lines of telegraph." And it was further held therein that a tax upon the property owned and used by the corporation within that State "is not forbidden by the fact of the acceptance on the part of the company of the rights conferred on telegraph companies by the Revised Statutes (§ 5263), nor by the com-

merce clause of the Constitution." In the opinion of the court in that case it was said: "While the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post-roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the State for the protection of its property and its rights, is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State in which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support." See, also, *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641.

With respect to the question of interstate commerce urged by appellant as affecting the right of the city to impose the charges, we think the authorities are abundant to show that, whether the charges in question come under the police or the taxing power, they do not offend against the interstate commerce clause. *Leloup v. Port of Mobile*, 127 U. S. 640; *Gibbons v. Ogden*, 9 Wheat. 203; *Railroad Co. v. Fuller*, 17 Wall. 560; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489; *W. U. Tel. Co. v. Pendleton*, 122 id. 347.

Appellants further claim that it offends against the United States Constitution, in that it conflicts with the provision in the fourteenth amendment that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, is disposed of by the case of *New York v. Squire*, 145 U. S. 175.

It will thus be seen that we agree with the conclusion reached by the referee "that the State has power to impose taxes upon the property of such companies within the State, under the laws of the State, and that a municipality,

under its delegated powers from the State, can impose all lawful burdens upon the property of such companies situated within its corporate limits. Therefore, if these license charges upon poles and wires within the city limits should be held or found to be legally imposed by the State, they would not be in conflict with the provisions of this act of Congress; or if the municipality, under its delegated power of 'regulation' from the State, or what is commonly known as 'police power,' should be found to have the right to make such ordinances, and levy such imposts upon the poles and wires within its corporate limits of a company operating an interstate line, such ordinances and charges would not be in conflict with the act, as being neither on the general business of the company nor an interference with such interstate business."

This view is consistent with the principle laid down in the case of *Leloup v. Port of Mobile*, *supra*, and kindred cases, which hold that "the property of a telegraph company situated within a State may be taxed by the State as all other property is taxed, but its business of an interstate character cannot be thus taxed." It was therein held that no State within which a telegraph company sees fit to establish an office can impose upon it a license tax, or require it to take out a license for the transaction of its business; that the telegraphic communications carried on between different States are interstate commerce, and within the power of regulation conferred upon Congress, free from the control of State regulations, except such as are strictly of a police character.

A review, therefore, of the authorities will show that the true construction to be given to the Constitution of the United States, and the statutes passed relating to telegraph companies, are consistent with the right of the States to tax the property of corporations within their limits, and to subject them to regulations of a police character, and that the United States Constitution and statutes prohibit the States from placing any charge or tax upon business of an interstate character, or interfering with, obstructing or de-

stroying the working or business of such federal agencies. The record makes clear the fact that the plaintiff in no way, by the charge made, attempted to impose a tax upon business of an interstate character. The appellant, however, insists, if this conclusion should be reached, that the charge was, in effect, a tax which was illegally levied upon the property of the companies, contrary to the Constitution and laws of Pennsylvania regulating the right and mode of taxation. In his argument he correctly presents the view which the courts of that State have adhered to in construing the method which should be adopted under the laws of that State in levying taxes, viz., upon an *ad valorem* principle; that is to say, that property is to be taxed at a uniform rate according to its value. If it had been shown that this was a tax, then there could be no question but that this principle, not having been adhered to in levying the same would have rendered the charges in suit invalid.

We think, however, apart from the disclaimer of the respondent, it is clear that, in imposing the charge sought to be recovered in this action, the city of Philadelphia in no way intended to place a tax upon the business of the defendant companies, nor to impose a tax upon their property, but its claim is based upon its right, under police power, to levy such a charge.

The validity of license fees, or similar charges by a municipality under the police power, has been frequently asserted, and, so far as Pennsylvania and this State are concerned, the question must be regarded as settled in favor of their validity. As we have already endeavored to point out, charges thus imposed under the police power, and those imposed for revenue, proceed on an entirely different and distinct principle, and in cases where supposed police regulations come in question, the test must be whether the end in view is one within the regulative sphere, and whether the means are reasonably appropriate. An examination of the ordinances levying this charge, we think, will leave no room for misconstruction as to their true intent and pur-

pose, showing clearly that such charges were for regulation, and not for revenue.

The ordinance of January 6, 1881, which was the first ordinance on the subject, begins as follows :

An ordinance to regulate the erection and maintenance of telegraph poles in the corporate limits of the city of Philadelphia.

Whereas, Great inconvenience and annoyance have been occasioned to property owners by the placing of telegraph poles in front of their premises ; and

Whereas, The lives and property of citizens traveling upon the public streets and highways have been imperiled by the erection and maintenance of inadequate or unsound telegraph poles thereon, so that it has become necessary to establish a system for the proper inspection of such poles and for the regulation of the erection and maintenance thereof.

And the ordinance of March 30, 1883, begins as follows :

An ordinance to regulate the introduction and use of underground conduits, wires and cables for electrical conductors in the streets of Philadelphia, etc.

These ordinances, and the additional fact proved in the case that all charges were removed from such wires as were placed underground, will show that the object sought was not the raising of revenue, but the reimbursement to some extent of the expense made necessary to the municipality in discharging its duty in furtherance of the public safety and convenience, as well as its co-ordinate duty to the defendants of protecting their property, by a proper regulation and inspection of overhead wires.

So far as this State is concerned, the case of *People v. Squire*, 107 N. Y. 593, is authority for the view "that regulations of the character provided for in said acts are strictly police regulations, such as are within the legitimate authority of the Legislature to delegate the exercise thereof to municipal corporations. That the right to exercise this police power is a governmental function which cannot be alienated, surrendered or abridged by the Legislature by any grant, contract or delegation whatsoever."

So far as the State of Pennsylvania is concerned, the highest appellate court of that State has twice decided these

very ordinances now brought in question to be valid. *Mutual Union Tel. Co. v. Phila.* and *W. U. Tel. Co. v. Phila.*, 22 W. N. Cases, 39; *Chester v. Phila.*, *Reading and Pottsville Tel. Co.* [1892], Penn. S. C. Adv. Cases, 511; *Allentown v. W. U. Tel. Co.* [1892], id. 510.

The description given in these cases of the condition of the streets confirms what the observation of every citizen makes evident, that lives and property can only be protected against the dangers threatened by overhead wires, by strict regulation and the most careful inspection. In addition, we are referred to the following cases in Pennsylvania, distinctly holding that the plaintiff has power to exercise police regulation over telegraph lines. *City of Phila. v. W. U. Tel. Co.*, 2 W. N. Cases, 455, 460; *Southwark R. R. Co. v. Phila.*, 11 Wright, 321; *Branson v. Phila.* id. 322.

It seems to us, therefore, that with the legal questions disposed of, all that remained was to determine whether the ordinances and the charges made were a proper exercise of the police power delegated to the plaintiff or possessed by it. And the referee is sustained by the cases to which he refers in his opinion, in holding that whether there has been a proper exercise by the municipality of this power of regulation is to be determined by a consideration of the reasonableness of the terms of the ordinance and of the charges imposed. This the referee proceeded to do.

As to the expense entailed upon the city of Philadelphia, it was shown that in order to have it thorough and effective, it was deemed essential to require a morning report called an "electrical report," to be made by every policeman on duty at night, of whom there are 1,526 receiving a salary of two dollars and fifty cents a day. In addition, it was shown that the appropriation for the police bureau in 1891 was over a million dollars, for the bureau of fire escapes over six hundred thousand and for the electrical bureau over one hundred and forty thousand dollars, and that these different bureaus were engaged and took part in enforcing the regulations and ordinances in question in the public

interest. It was also given in testimony by the chief of the fire bureau that if the wires were put under ground there would be a saving of one fire station, whose expense annually is about the amount of the total charges on all the companies.

Upon such testimony, having regard to the extensive area of a city like Philadelphia and the range of work and expense involved in the regulation of poles and wires, we think the referee was right in holding that, contrasted with the large outlay made by the municipality, the amounts charged the defendants and sought to be recovered in this action are reasonable. We think that the Supreme Court (of Appeal) in the case of *Allentown v Western Union Telegraph Company*, *supra*, in considering the particular charges in these ordinances, correctly defined the rule of law to be applied, viz: "The amount of the license fee in such cases rests with city councils in the first instance, and only upon an abuse of their discretion is the court justified in interfering. We cannot say that discretion has been abused in this case or that the license fee is unreasonable.

It will thus be seen that we concur with the view taken by the referee as to the reasonableness of the charges imposed on the defendants. Indeed, we might well have allowed this judgment to stand upon the able opinion of the referee, which thoroughly discusses every question that has been presented upon this appeal. It would serve no useful purpose to go over the same ground, refer to the same authorities and draw the same conclusions as the referee has done. Though the question in principle is an important one, we do not regard it as either novel or difficult. An examination of cases in the United States Supreme Court and in the highest appellate courts of this State and Pennsylvania supports the legal principle invoked by the plaintiff, and the evidence adduced in this case sustains the conclusion of the referee favorable to plaintiff's right to recover.

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In our opinion the judgment should be affirmed, with costs.

VAN BRUNT, P. J., and BARRETT, J., concurred.
Judgment affirmed, with costs.

NOTE.—See note to *St. Louis v. W. U. Tel. Co.* (second decision), *post*.
See INDEX to this and previous volumes, title "Constitutional Law."

CHESTER CITY V. WESTERN UNION TELEGRAPH COMPANY,
Appellant.

Pennsylvania Supreme Court, February 20, 1893.

(154 Pa. St. 464.)

TELEGRAPH.—MUNICIPAL LICENSE FEE.—PLEADING.

An affidavit of defense in an action for the recovery of license fees imposed by municipal ordinance upon a telegraph company, held insufficient; it alleging merely that the amount of the tax was unreasonably large in that it was disproportionate to the ordinary expenses of municipal officers, and not taking into consideration the additional expense incident to the increased responsibility imposed upon the city by having the poles in its streets, it being bound at its peril to keep the streets safe for the traveling public.

APPEAL by defendant below from order of Court of Common Pleas, Delaware county, granting judgment for want of sufficient affidavit of defense.

It appeared from the record that in 1884 and 1889 the city of Chester, by ordinance, provided that every telegraph company owning poles within the city should pay a license fee of \$1.00 upon each new pole which it should erect, and \$1.00 per annum for each pole maintained by it, and prescribing penalties for failure to comply with the ordinance.

Action to collect \$1,470, the amount of accrued license fees upon 245 poles from 1885 to 1891. Further facts stated in the opinion.

Silas W. Pettit, John R. Read and H. B. Gill, for plaintiff.

Orlando Harvey, for appellee.

Per CURIAM: It was conceded by the appellant company that the city of Chester has the power to impose a reasonable charge for a license to erect telegraph poles within the limits of the municipality. The ordinance of the city imposed a license tax of one dollar per year for each pole. We have held in a number of recent cases that this amount is not so unreasonable as to justify us in interfering with the discretion of such municipalities. In this case, however, the court below entered judgment for want of a sufficient affidavit of defence. The affidavit in question contains this averment:

"The said Western Union Telegraph Company avers that the sum sought to be recovered in this cause pretends to be imposed and is sought to be justified as a license tax merely in aid, and as part of, a police regulation of the city of Chester, and, as such, is unjust and unreasonable in that the amount thereof is wholly disproportioned to the usual, ordinary or necessary expense of municipal officers, of issuing licenses, and other expenses thereby imposed upon the municipality of the city of Chester, but is, on the contrary, largely in excess thereof, to wit, at least five times the expense thereof, wherefore the sum is unreasonable, not authorized by law and therefore void."

For the purposes of this case we must treat this averment as true, as far as it goes. The difficulty is it does not go far enough. It refers only to the usual, ordinary or necessary expense of municipal officers, of issuing licenses and other expenses thereby imposed upon the municipality. It makes no reference to the liability imposed upon the city by the erection of telegraph poles. It is the duty of the city to see that the poles are safe, and properly maintained, and should a citizen be injured in person or property by reason of a neglect of such duty, an action might lie against

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the city for the consequences of such neglect. It is a mistake therefore to measure the reasonableness of the charge by the amount actually expended by the city for a particular year, to the particular purposes specified in the affidavit.

Judgment affirmed.

NOTE.—See note to second following case.

ST. LOUIS V. WESTERN UNION TELEGRAPH COMPANY.

U. S. Supreme Court, March 6, 1893.

(148 U. S. 93.)

TELEGRAPH POLES IN STREETS.—MUNICIPAL RENTAL-CHARGE.—POST-ROADS ACT.

A municipal ordinance requiring the payment of a fixed sum for each telegraph or telephone pole maintained in the streets does not impose a privilege or license tax. It is in the nature of rental.

Such charge is not forbidden upon common law principles, nor by the fact that the poles belong to a telegraph company which has accepted the provisions of the post-roads act of Congress. The privilege granted by that statute is, like any other franchise, to be exercised in subordination to public and private rights.

Whether the rental charged is reasonable is a matter open for determination by the courts.

Cases of this series cited in opinion: *W. U. Tel. Co. v. Atty.-Genl. of Mass.*, vol. 2, p. 57; *New Orleans v. Gt. So. Teleph. & Tel. Co.*, vol. 2, p. 122; *Philadelphia v. W. U. Tel. Co.*, vol. 3, p. 52.

ERROR to Circuit Court, E. D., Missouri.

Statement of case by the court:

On February 25, 1881, the city of St. Louis passed an ordinance, known as ordinance No. 11,604, authorizing any telegraph or telephone company duly incorporated according to law, doing business or desiring to do business in the city of St. Louis, to set its poles, pins, abutments, wires

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and other fixtures along and across any of the public roads, streets and alleys of the city, subject to certain prescribed regulations. Sections six, eight and nine read as follows :

Sec. 6. Every telegraph or telephone company doing business in this city shall keep on deposit with the treasurer the sum of fifty dollars, subject to order of the street commissioner, to be used by him in restoring any sidewalk, gutter, street or alley pavement displaced or injured in the erection, alteration or removal of any pole of such company, when said company refuses or fails to make such restoration to the satisfaction of such commissioner. Any company failing to make such deposit within thirty days after the passage of this ordinance, or within five days after commencing business, if a new company, or which shall fail to make good the amount when any portion of it has been expended as herein provided, within five days after notice so to do has been sent by the street commissioner, shall be deemed guilty of a misdemeanor and punished as hereinafter provided.

Sec. 8. Any company erecting poles under the provision of this ordinance shall, before obtaining a permit therefor from the board of public improvements, file an agreement in the office of the city register permitting the city of St. Louis to occupy and use the top cross-arm of any pole erected, or which is now erected, for the use of said city for telegraph purposes free of charge.

Sec. 9. Nothing contained in this ordinance shall be so construed as to in any manner affect the right of the city in the future to prescribe any other mode of conducting such wires over or under its thoroughfares.

On March 22, 1884, another ordinance, known as ordinance No. 12,733, was passed. This ordinance was entitled "An ordinance to amend ordinance number 11,604," etc., and amended that ordinance by adding certain sections, of which section 11 reads as follows :

Sec. 11. From and after the first day of July, 1884, all telegraph and telephone companies, which are not by ordinance taxed on their gross income for city purposes, shall pay to the city of St. Louis, for the privilege of using the streets, alleys and public places thereof, the sum of five dollars per annum for each and every telegraph or telephone pole erected or used by them in the streets, alleys and public places in said city.

This section continued in force and was incorporated into and became a part of an ordinance of the city entitled "An ordinance in revision of the ordinances of the city of St. Louis, and to establish new ordinance provisions for the government of said city," approved April 12, 1887, and

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numbered 14,000, the section being in said revised ordinance known as section 671 of article 8 of chapter 15.

The Western Union Telegraph Company, being one of the companies designated in section 671, not taxed on its gross income for city purposes, and failing to pay the sum of five dollars per annum for each telegraph pole, as required by said section, on April 7, 1888, there was filed in the office of the clerk of the Circuit Court of the city of St. Louis a petition setting forth these various ordinances, alleging that the telegraph company had during the three years last past held, owned and used in the streets and public places of the city of St. Louis 1509 telegraph poles, and praying to recover the sum of \$22,635 therefor. This suit was removed by the telegraph company to the United States Circuit Court for the eastern district of Missouri, and on February 11, 1889, an amended answer was filed by the company admitting its use of the streets of the city of St. Louis as charged, and that it was not taxed on its gross income for city purposes, but denying the validity of the said ordinance, and the authority of the city to pass it. It also set up as defenses that it was a corporation chartered, created and organized under the laws of the State of New York; that it owned, controlled and used lines of telegraph in various parts of the United States, which connected with its lines in the city of St. Louis; that on the 5th of June, 1867, it duly filed with the postmaster-general of the United States a written acceptance of the restrictions and obligations required by law under and in accordance with the act of Congress of the United States, approved July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes," and that it had ever since been subject to and complied with the terms of such act; that the streets and public places of the city of St. Louis were established post-roads of the United States under and in pursuance of the laws of the United States, and of the authorized rules and regulations of the officers and departments of the United States, made,

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passed and adopted in pursuance of said laws ; that it has constructed, operated and maintained its lines of telegraph in the city of St. Louis under and by virtue of the authority of said acts of Congress ; that while the city of St. Louis claims compensation from the defendant in the sum of five dollars per annum on account of each and every telegraph pole in the streets, alleys and public places in the city, yet in fact the said sum so assessed and sought to be recovered from it is a privilege or license tax for the privilege of carrying on its business in the city of St. Louis ; and that its assessment and attempted enforcement and collection are in violation of article 1, section 8, paragraphs 3 and 7, of the Constitution of the United States.

The defendant also alleged that it had complied with all the terms of ordinance No. 11,604 ; and, further, that during the time set forth in the petition all its property within the city of St. Louis was assessed in pursuance of law for the purpose of taxation by the State and city, and that it had paid all taxes levied thereon ; and, still further, that the ordinance set forth imposed upon defendant a burden and tax additional to the taxes regularly assessed upon the property of defendant, without any corresponding or special advantage to the defendant ; and that, in so far as it attempted to exact five dollars per annum for each pole, it was unreasonable, unjust, oppressive and void. The case was tried by the court without a jury, and on June 17, 1889, a judgment was entered in favor of the defendant, the court holding that the burden imposed was a tax, and imposed in such form that it could only be regarded as a privilege or license tax, which the city had no authority to impose. 39 Fed. Rep. 59. To reverse such judgment, the city sued out a writ of error from this court.

W. C. Marshall, for plaintiff in error.

John F. Dillon (with whom was *Rush Taggart* on the brief), and *Elenious Smith* (with whom were *Charles W.*

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Wells, Willard Brown and George H. Fearons on the brief), for defendant in error.

Justice BREWER delivered the opinion of the court :

* * * * *

And, first, with reference to the ruling that this charge was a privilege or license tax. To determine this question, we must refer to the language of the ordinance itself, and by that we find that the charge is imposed for the privilege of using the streets, alleys and public places, and is graduated by the amount of such use. Clearly, this is no privilege or license tax. The amount to be paid is not graduated by the amount of the business, nor is it a sum fixed for the privilege of doing business. It is more in the nature of a charge for the use of property belonging to the city — that which may properly be called rental. "A tax is a demand of sovereignty ; a toll is a demand of proprietorship." *State Freight Tax Cases*, 15 Wall. 232, 278. If, instead of occupying the streets and public places with its telegraph poles, the company should do what it may rightfully do, purchase ground in the various blocks from private individuals, and to such ground remove its poles, the section would no longer have any application to it. That by it the city receives something which it may use as revenue, does not determine the character of the charge or make it a tax. The revenues of a municipality may come from rentals as legitimately and as properly as from taxes. Supposing the city of St. Louis should find its city hall too small for its purposes, or too far removed from the centre of business, and should purchase or build another more satisfactory in this respect, it would not thereafter be forced to let the old one remain vacant or to immediately sell it, but might derive revenue by renting its various rooms. Would an ordinance fixing the price at which those rooms could be occupied be in any sense one imposing a tax? Nor is the character of the charge changed by reason of the fact that it is not imposed upon such telegraph companies as by ordinance are taxed on their gross income for

city purposes. In the illustration just made in respect to a city hall, suppose that the city, in its ordinance fixing a price for the use of its rooms, should permit persons who pay a certain amount of taxes to occupy a portion of the building free of rent, that would not make the charge upon others for their use of rooms a tax. Whatever the reasons may have been for exempting certain classes of companies from this charge, such exemption does not change the character of the charge, or make that a tax which would otherwise be a matter of rental. Whether the city has power to collect rental for the use of streets and public places, or whether, if it has, the charge as here made is excessive, are questions entirely distinct. That this is not a tax upon the property of the corporation, or upon its business, or for the privilege of doing business, is thus disclosed by the very terms of the section. The city has attempted to make the telegraph company pay for appropriating to its own and sole use a part of the streets and public places of the city. It is seeking to collect rent. While we think that the Circuit Court erred in its conclusions as to the character of this charge, it does not follow therefrom that the judgment should be reversed, and a judgment entered in favor of the city. Other questions are presented which compel examination.

Has the city a right to charge this defendant for the use of its streets and public places? And here, first, it may be well to consider the nature of the use which is made by the defendant of the streets, and the general power of the public to exact compensation for the use of streets and roads. The use which the defendant makes of the streets is an exclusive and permanent one, and not one temporary, shifting and in common with the general public. The ordinary traveller, whether on foot or in a vehicle, passes to and fro along the streets, and his use and occupation thereof are temporary and shifting. The space he occupies one moment he abandons the next to be occupied by any other traveler. This use is common to all members of the public, and it is a use open equally to citizens of other States with

those of the State in which the street is situate. But the use made by the telegraph company is, in respect to so much of the space as it occupies with its poles, permanent and exclusive. It as effectually and permanently disposes of the general public as if it had destroyed that amount of ground. Whatever benefit the public may receive in the way of transportation of messages, that space is, so far as respects its actual use for purposes of a highway and personal travel, wholly lost to the public. By sufficient multiplication of telegraph and telephone companies the whole space of the highway might be occupied, and that which was designed for general use for purposes of travel entirely appropriated to the separate use of companies and for the transportation of messages.

We do not mean to be understood as questioning the right of municipalities to permit such occupation of the streets by telegraph and telephone companies, nor is there involved here the question whether such use is a new servitude or burden placed upon the easement, entitling the adjacent lot owners to additional compensation. All that we desire or need to notice is the fact that this use is an absolute, permanent and exclusive appropriation of that space in the streets which is occupied by the telegraph poles. To that extent it is a use different in kind and extent from that enjoyed by the general public. Now, when there is this permanent and exclusive appropriation of a part of the highway, is there in the nature of things anything to inhibit the public from exacting rental for the space thus occupied? Obviously not. Suppose a municipality permits one to occupy a space in a public park, for the erection of a booth in which to sell fruit and other articles; who would question the right of the city to charge for the use of the ground thus occupied, or call such charge a tax, or anything else except rental? So, in like manner, while permission to a telegraph company to occupy the streets is not technically a lease, and does not in terms create the relation of landlord and tenant, yet it is the giving of the exclusive use of real estate, for which the giver

has a right to exact compensation, which is in the nature of rental. We do not understand it to be questioned by counsel for the defendant that, under the Constitution and laws of Missouri, the city of St. Louis has the full control of its streets, and in this respect represents the public in relation thereto.

It is claimed, however, by defendant, that under the act of Congress of July 24, 1866, c. 230, 14 Stat. 221, and by virtue of its written acceptance of the provisions, restrictions and obligations imposed by that act, it has a right to occupy the streets of St. Louis with its telegraph poles. The first section of that act contains the supposed grant of power. It reads :

That any telegraph company now organized, or which may be hereafter organized under the laws of any State in this Union, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States, which have been or may hereafter be declared such by act of Congress, and over, under or across the navigable streams or waters of the United States: *Provided*, that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post-roads.

By sec. 3964, Rev. St., U. S. :

The following are established post-roads: * * * All letter carrier routes established in any city or town for the collection and delivery of mail matters.

And the streets of St. Louis are such "letter carrier routes." So also by the act of March 1, 1884, 23 Stat. 3 :

All public roads and highways, while kept up and maintained as such, are hereby declared to be post routes.

It is a misconception, however, to suppose that the franchise or privilege granted by the act of 1866 carries with it the unrestricted right to appropriate the public property of a State. It is like any other franchise, to be exercised

in subordination to public as to private rights. While a grant from one government may supersede and abridge franchises and rights held at the will of its grantor, it cannot abridge any property rights of a public character created by the authority of another sovereignty. No one would suppose that a franchise from the federal government to a corporation, State or national, to construct interstate roads or lines of travel, transportation or communication, would authorize it to enter upon the private property of an individual, and appropriate it without compensation. No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation. And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a State. It would not be claimed, for instance, that under a franchise from Congress to construct and operate an interstate railroad, the grantee thereof could enter upon the State-house grounds of the State, and construct its depot there, without paying the value of the property thus appropriated. Although the State-house grounds be property devoted to the public uses, it is property devoted to the public uses of the State, and property whose ownership and control are in the State, and it is not within the competency of the national government to dispossess the State of such control and use, or appropriate the same to its own benefit, or the benefit of any of its corporations or grantees, without suitable compensation to the State. This rule extends to streets and highways; they are the public property of the State. While for purposes of travel and common use, they are open to the citizens of every State alike, and no State can, by its legislation, deprive the citizens of another State of such common use, yet, when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or corporation of the same or another State, or a corporation of the national

government, it is within the competency of the State, representing the sovereignty of that local public, to exact for its benefit compensation for this exclusive appropriation. It matters not for what this exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the State may, if it chooses, exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated.

This is not the first time that an effort has been made to withdraw corporate property from State control, under and by virtue of this act of Congress. In *Western Union Telegraph Company v. Massachusetts*, 125 U. S. 530, the telegraph company set up that act as a defense against State taxation, but the defense was overruled. Mr. Justice MILLER, on page 548, speaking for the court, used this language: "This, however, is merely a permissive statute, and there is no expression in it which implies that this permission to extend its lines along roads not built or owned by the United States, or over and under navigable streams, or over bridges not built or owned by the Federal government, carries with it any exemption from the ordinary burdens of taxation. While the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post-roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the State for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the Congress of the United States in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support."

If it is, as there held, simply a permissive statute, and nothing in it which implies that the permission to extend

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its lines along roads not built or owned by the United States carries with it any exemption from the ordinary burdens of taxation, it may also be affirmed that it carries with it no exemption from the ordinary burdens which may be cast upon those who would appropriate to their exclusive use any portion of the public highways.

Again, it is said that by ordinance No. 11,604, the city contracted with defendant to permit the erection of these poles in consideration of the right of the city to occupy and use the top cross-arm of any pole for its own telegraph purposes, free of charge; and in support of that proposition the case of *New Orleans v. Southern Telephone & Telegraph Co.*, 40 La. Ann. 41, is cited. But in that case it appeared that the telephone company had set its poles and constructed its lines under and by virtue of the grant made by the ordinance, and hence the conditions named therein were held part of the contract between the city and the telephone company, which the former was not at liberty to disregard. As stated in the opinion, page 45: "Obviously, upon the clearest considerations of law and justice, the grant of authority to defendant, when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside or to interpolate new and more onerous considerations therein. Such has been the well-recognized doctrine of the authorities since the *Dartmouth College Case*, 4 Wheat. 518." The same principle controlled the cases of *Commonwealth v. New Bedford Bridge*, 2 Gray, 339; *Kansas City v. Corrigan*, 86 Missouri, 67; *Chicago v. Sheldon*, 9 Wall. 50.

But the difficulty of the application of that doctrine in this case is that there is nothing to show that a single pole was erected under or by virtue of ordinance No. 11,604. The only statement in the agreed facts is that they were erected prior to July 1, 1884. If we turn to the oral testimony, there is nothing tending to show that any were erected after the 25th of February, 1881, the date of the passage of ordinance No. 11,604. On the contrary, that testimony shows that the company had been engaged in

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the telegraph business in the city of St. Louis for 15 years or more prior to 1881. There is nothing, either, in the agreed facts, as to the use of the top cross-arm of any poles by the city of St. Louis, and the testimony tends to show that they were so used prior to 1881.

Whatever, therefore, of estoppel might arise if anything had been done by the telegraph company under the ordinance to change its position, as the case now stands none can be invoked, and all that can be said of the ordinance is that, in its application to the facts as they appear, there is simply a temporary matter of street regulation, and one subject to change at the pleasure of the city. It is unnecessary, however, to consider these matters at length, for on a new trial the facts in respect thereto can be more fully developed. It is true that in cases tried by the court, where all the facts are specifically found or agreed to, it is within the power of this court, in reversing, to direct the judgment which shall be entered upon such findings. At the same time if for any reasons justice seems to require it, the court may simply reverse and direct a new trial. Indeed, this has been done, under special circumstances, in cases where there were no findings of fact or agreed statement, or where that which was presented was obviously defective. *Graham v. Bayne*, 18 How. 60; *Flanders v. Tweed*, 9 Wall. 425.

Another matter is discussed by counsel which calls for attention, and that is the proposition that the ordinance charging five dollars a pole per annum is unreasonable, unjust and excessive. Among other cases cited in support of that proposition is *Philadelphia v. Western Union Tel. Co.*, 40 Fed. Rep. 615, in which an ordinance similar in its terms was held unreasonable and void by the Circuit Court of the United States for the eastern district of Pennsylvania. We think that question, like the last, may be passed for further investigation on the subsequent trial. *Prima facie*, an ordinance like that is reasonable. The court cannot assume that such a charge is excessive, and so

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excessive as to make the ordinance unreasonable and void ; for, as applied in certain cases, a like charge for so much appropriation of the streets may be reasonable. If within a few blocks of Wall street, New York, the telegraph company should place on the public streets 1,500 of its large telegraph poles, it would seem as though no court could declare that five dollars a pole was an excessive annual rental for the ground so exclusively appropriated ; while, on the other hand, a charge for a like number of poles in a small village, where space is abundant and land of little value, would be manifestly unreasonable, and might be so excessive as to be void. Indeed, it may be observed, in the line of the thoughts heretofore expressed, that this charge is one in the nature of rental ; that the occupation by this interstate commerce company of the streets cannot be denied by the city ; that all that it can insist upon is, in this respect reasonable compensation for the space in the streets thus exclusively appropriated ; and it follows in the nature of things that it does not lie exclusively in its power to determine what is reasonable rental. The inquiry must be open in the courts, and it is an inquiry which must depend largely upon matters not apparent upon the face of the ordinance, but existing only in the actual state of affairs in the city.

We think that this is all that need be said in reference to the case as it now stands. For the reasons given, the judgment is

Reversed and the case is remanded for a new trial.
Justice BROWN delivered a dissenting opinion.

NOTE.— See note to next case.

See also INDEX, title "Constitutional Law."

ST. LOUIS V. WESTERN UNION TELEGRAPH COMPANY.

United States Supreme Court, May 15, 1893.

(149 U. S. 465.)

TELEGRAPH COMPANY.—MUNICIPAL CONTROL.—RENTAL.

The city of St. Louis has such interest in and control over the streets, alleys, and public places within its limits as authorizes it to impose upon a telegraph company a charge in the nature of rental for the exclusive use of portions of its streets for the maintenance of poles.

Cases of this series cited in opinion: *Julia Building Association v. Bell Teleph. Co.*, vol. 1, p. 801; *City of St. Louis v. Bell Teleph. Co.*, vol. 2, p. 44.

ON petition for a rehearing of this case, reported last above, the court granted leave to file briefs upon the question stated in the head-note.

John F. Dillon, Rush Taggart and Elenious Smith,
for petitioner.

W. C. Marshall, opposing.

BREWER, J.: In the opinion heretofore announced, it was said: "We do not understand it to be questioned by counsel for the defendant that, under the Constitution and laws of Missouri, the city of St. Louis has the full control of its streets in this respect, and represents the public in relation thereto." A petition for a rehearing has been filed, in which it is claimed that the court misunderstood the position of counsel; and, further, that in fact the city of St. Louis has no such control. Leave having been given therefor, briefs on the question whether such control exists have been filed by both sides, that of the telegraph company being quite full and elaborate.

We see no reason to change the views expressed as to the power of the city of St. Louis in this matter. Control over the streets resides somewhere. As the legislative power of a State is vested in the Legislature, generally that body has the supreme control, and it delegates to municipal corporations such measure thereof as it deems best. The city of St. Louis occupies a unique position. It does not, like most cities, derive its powers by grant from the Legislature, but it framed its own charter under express authority from the people of the State, given in the Constitution. Sections 20 and 21 of article 9 of the Constitution of 1875 of the State of Missouri authorized the election of thirteen freeholders to prepare a charter to be submitted to the qualified voters of the city, which, when ratified by them, was to "become the organic law of the city." Section 22 provides for amendments, to be made at intervals of not less than two years, and upon the approval of three-fifths of the voters. Sections 23 and 25 required the charter and amendments to always be in harmony with and subject to the Constitution and laws of Missouri, and gave the General Assembly the same power over this city, notwithstanding the provisions of this article, as was had over other cities. In pursuance of these provisions of the Constitution a charter was prepared and adopted, and is, therefore, the "organic law" of the city of St. Louis, and the powers granted by it, so far as they are in harmony with the Constitution and laws of the State, and have not been set aside by any act of the General Assembly, are the powers vested in the city. And this charter is an organic act, so defined in the Constitution, and is to be construed as organic acts are construed. The city is, in a very just sense, an "*imperium in imperio*." Its powers are self-appointed, and the reserved control existing in the General Assembly does not take away this peculiar feature of its charter.

An examination of this charter (2 Rev. Stat. Mo. 1879, pp. 1572 and following) will disclose that very large and general powers are given to the city. but it would unneces-

sarily prolong this opinion to quote the many sections defining these powers. It must suffice to notice those directly in point. Paragraph 2 of section 26 of article 3 gives the mayor and assembly power, by ordinance, "to establish, open, vacate, alter, widen, extend, pave, or otherwise improve and sprinkle all streets, avenues, sidewalks, alleys, wharves, and public grounds and squares, and provide for the payment of the costs and expenses thereof in the manner in this charter prescribed; and also to provide for the grading, lighting, cleaning and repairing the same, and to condemn private property for public uses, as provided for in this charter; to construct and keep in repair all bridges, streets, sewers and drains, and to regulate the use thereof," etc. The 5th paragraph of the same article grants power "to license, tax, and regulate * * * telegraph companies or corporations, street railroad cars," etc. Article 6 treats of public improvements, including the opening of streets. Section 2 provides for condemning private property, and "for establishing, opening, widening or altering any street, avenue, alley, wharf, market place or public square, or route for a sewer or water pipe." By section 4, commissioners are to be appointed to assess the damages. By section 5, it is made the duty of these commissioners to ascertain the actual value of the land and premises proposed to be taken, and the actual damages done to the property thereby; "and for the payment of such values and damages to assess against the city the amount of benefit to the public generally, and the balance against the owner or owners of all property which shall be especially benefited by the proposed improvement in the opinion of the commissioners, to the amount that each lot of such owner shall be benefited by the improvement." Except, therefore, for the special benefit done to the adjacent property, the city pays out of its treasury for the opening of streets, and this power of the city to open and establish streets, and the duty of paying the damages therefor out of the city treasury, were not created for the

first time by this charter, but have been the rule as far back as 1839.

Further than that, with the charter was, as authorized by the Constitution, a scheme for an enlargement of the boundaries of the city of St. Louis, and an adjustment of the relations consequent thereon between the city and the county. The boundaries were enlarged, and by section 10 of the scheme it was provided that

"Sec. 10. All the public buildings, institutions, public parks and property of every character and description heretofore owned and controlled by the county of St. Louis within the limits as extended, including the court house, the county jail, the insane asylum, and the poor house, are hereby transferred and made over to the city of St. Louis, and all the right, title and interest of the county of St. Louis in said property, and in all public roads and highways within the enlarged limits, is hereby vested in the city of St. Louis, and divested out of the county; and in consideration of the city becoming the proprietor of all the county buildings and property within its enlarged limits, the city hereby assumes the whole of the existing county debt and the entire park tax." (2 Rev. Stat. Mo. 1879, p. 1565.)

Obviously, the intent and scope of this charter are to vest in the city a very large control over public property and property devoted to public uses within the territorial limits.

It is given power to open and establish streets, to improve them as it sees fit, and to regulate their use, paying for all of this out of its own funds. The word "regulate" is one of broad import. It is the word used in the Federal Constitution to define the power of Congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be. If the city gives a right to the use of the streets or public grounds, as it did by ordinance No. 11,604, it simply regulates the use when it prescribes the terms and conditions upon which they shall be used. If it

should see fit to construct an expensive boulevard in the city, and then limit the use of vehicles of a certain kind or exact a toll from all who use it, would that be other than a regulation of the use? And so it is only a matter of regulation of use when the city grants to the telegraph company the right to use exclusively a portion of the street, on condition of contributing something towards the expense it has been to in opening and improving the street. Unless, therefore, the telegraph company has some superior right which excludes it from subjection to this control on the part of the city over the streets, it would seem that the power to require payment of some reasonable sum for the exclusive use of a portion of the streets was within the grant of power to regulate the use. That the company gets no such right from the general government is shown by the opinion heretofore delivered, nor has it any such from the State. The law in force in Missouri from 1866, gives certain rights in streets to "companies organized under the provisions of this article." Of course, the defendant, a corporation organized under the laws of the State of New York, can claim no benefit of this. It is true that, prior to that time, and by the act of November 17, 1855 (2 Rev. Stat. Mo. 1855, p. 1520), the right was given to every telegraph corporation to construct its lines along the highways and public roads; but that was superseded by the legislation of 1866; and when in force it was only a permission, a license, which might be revoked at any time; and, further, whatever rights, if any, this defendant may have acquired to continue the use of the streets already occupied at the time of the revision of 1866, it cannot with any show of reason be contended that it received an irrevocable power to traverse the State and occupy any other streets and highways.

Neither have we found in the various decisions of the courts of Missouri, to which our attention has been called, any denial of the power of the city in this respect. It is true in *Glasgow v. St. Louis*, 87 Missouri, 678; *Cummings v. St. Louis*, 90 Missouri, 269; *Glaessner v. Brewing Association*, 100 Missouri, 508; and *Belcher Sugar Refining Co.*

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v. St. Louis, &c., Grain Elevator Co., 101 Missouri, 192, the power of the city to devote the streets or public grounds to purely private uses was denied ; but in the cases of *Julia Building Association v. Bell Telephone Co.*, 88 Missouri, 258, and *St. Louis v. Bell Telephone Co.*, 96 Missouri, 623, it was expressly held that the use of the streets for telephone poles was not a private use (and of course telegraph poles stand on the same footing), and that a private corporation carrying on the public service of transportation of messages might be permitted to use the streets for its poles. Counsel rely strongly upon the latter of these cases, in which the power of the city to regulate the charges for telephone service was denied. But obviously that decision does not cover this case. The relation of a telephone or telegraph company to its patrons, after the use of the streets has been granted, does not affect the use, and power to regulate the use does not carry with it by implication power to regulate the dealings between the corporation having such use and its individual patrons ; but what the company shall pay to the city for the use is directly involved in a regulation of the use. The determination of the amount to be paid for the use is as much a matter of regulation as determining the place which may be used or the size or height of the poles. The very argument made by the court to show that fixing telephone charges is not a regulation of the use, is persuasive that fixing the price for the use is such a regulation. Counsel also refer to the case of *Atlantic & Pacific Railroad v. St. Louis*, 66 Missouri, 228, but there is nothing in that case which throws any light upon this. In that it appeared that there was an act of the Legislature giving to the railroad company a specific right in respect to the construction of a track within the city limits, and it was held that the company was entitled to the benefit of that act, and to claim the right given by the General Assembly, although it had after the passage of the act proceeded in the construction of the track under an ordinance of the city purporting to give it the privilege. But, as we have seen, the act of November 17, 1855, vested

in defendant no general and irrevocable power to occupy the streets in any city in the State through all time. We find nothing, therefore, in the cases cited from the Missouri courts which militates with the conclusions we have drawn as to the power of the city in this respect.

One other matter deserves notice. It will be seen by referring to our former opinion that one of the contentions of the counsel for the telegraph company was that by ordinance No. 11,604 the city had contracted with the company to permit the erection of these poles in consideration of the right of the city to occupy and use the top cross-arm free of charge. We quote this statement of counsel's claim from their brief: "Ordinance 11,604 granted defendant authority to set its poles in the streets of the city without any limitation as to time for valuable considerations stipulated; and having been accepted and acted on by defendant, and all of its conditions complied with, and the city having acquired valuable rights and privileges thereunder, said ordinance and its acceptance constitute a contract, which the city cannot alter in its essential terms without the consent of the defendant; nor can it impose new and burdensome considerations." And in respect to this, further on they say: "No question is or can be raised as to the validity of the contract made by ordinance No. 11,604, and its acceptance." But if the city had power to contract with defendant for the use of the streets, it was because it had control over that use. If it can sell the use for a consideration, it can require payment of a consideration for the use; and when counsel say that no question can be made as to the validity of such a contract, do they not concede that the city has such control over the use of the streets as enables it to demand pay therefor?

The petition for a rehearing is

Denied.

NOTE.—The foregoing nineteen cases treat of the right of electrical companies to occupy streets and highways (without special reference to the rights of abutting owners of land); and of the power of municipal corpor-

People, ex rel. v. Squire.

ations to authorize and direct such occupation, and to exact license fees or rental in consideration of such occupation.

It will be observed that the first nine relate to the electric railway, the next three to electric light appliances, and the remainder to those of the telephone and telegraph.

Two other cases of this volume, *Moore v. City of Eufaula* and *W. U. Tel. Co. v. City of Fremont*, are grouped with those relative to the rights of States to tax telegraph companies; since, though the subject under consideration in each was the right to exact a municipal license fee, the fee in question was rather in the nature of an occupation tax, not based upon the use of streets; and the validity of such tax as affected by the interstate commerce provisions of the United States Constitution was the main issue.

Other notes upon the power of municipalities to authorize and regulate the use of streets by electrical companies may be found at vol. 2 of this series, p. 175, and at vol. 3, p. 94, and upon the power to exact license fees, vol. 2, pp. 116, 127; vol. 3, pp. 55, 71.

Upon the latter subject, cases in this and earlier volumes of this series may be found in the INDEX under the title "License Fee;" upon the right of control, in vols. 1 and 2, the cases were grouped under the index title "Poles and Wires in Streets, Municipal Control of;" in vol. 3, under "Municipal Control."

**PEOPLE OF THE STATE OF NEW YORK, EX REL. NEW YORK
ELECTRIC LINES COMPANY, v. SQUIRE.**

United States Supreme Court, May 2, 1892.

(145 U. S. 175; affirming 2 Am. Elec. Cas. 176.)

NEW YORK SUBWAY ACTS.—CONSTITUTIONAL LAW.

The New York Subways Acts of 1895 and 1896 apply to the relator in common with all other companies operating or intending to operate electrical conductors in the city of New York.

Said statutes do not violate the Constitution of the United States by either (1) depriving the relator of property without due process of law; or (2) impairing the obligation of any contract which it had with the city prior to the passage of said acts.

The statutes are within the general police powers of the State.

THE COURT STATED THE CASE AS FOLLOWS:

This was an application for a writ of mandamus on

behalf of the New York Electric Lines Company, a New York corporation, to compel the commissioner of public works of New York city to give it written permission to make excavations and open up the streets and pavements of the city for the purpose of laying its wires and other conductors of electricity underground, and of making its underground electrical connections in accordance, it was claimed, with its franchises for such purposes, theretofore obtained from the city.

The application was presented to the Court of Common Pleas for the city and county of New York at a Special Term, and was denied on the ground that the relator had not obtained the approval of the commissioners of electrical subways, for that city and county, of the plans and specifications proposed by it for the construction of its underground electrical system. Upon appeal to the court in General Term, the order denying the application was affirmed (14 Daly, 154, 166), and the relator thereupon appealed to the Court of Appeals of the State, which affirmed the judgment below. 107 N. Y. 593. The record having been remitted to the Court of Common Pleas, and the judgment of the Court of Appeals having been there entered as its judgment, this writ of error was sued out.

The case, as presented by the petition for mandamus, and its accompanying exhibits is substantially this: The relator was incorporated on the 14th of October, 1882, under the general telegraph law of April 12, 1848 (Laws of 1848, ch. 265), and the various acts amendatory thereof and supplementary thereto, "for the purpose," as stated in its certificate of incorporation, "of owning, constructing, using, maintaining and leasing lines of telegraph wires or other electric conductors for telegraphic and telephonic communication, and for electric illumination, to be placed under the pavements of the streets, avenues and public highways of the cities of New York and Brooklyn, in the State of New York, and under the sidewalks of the streets and avenues of the said cities, and upon, over or under private lands in the said cities, within blocks of buildings

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erected or to be erected therein, and for the purpose of owning franchises for laying and operating the said lines of electric conductors, and the purchasing, owning and disposing of such real estate within the said cities, and such personal property as may from time to time be necessary and convenient to the building, using, maintaining and leasing the said lines of electric conductors."

By section 5 of the original act of 1848 telegraph companies were authorized to construct their lines "along and upon any of the public roads and highways, or across any of the waters within the limits of the State," *"provided the same shall not be so constructed as to incommode the public use of said roads or highways, or injuriously interrupt the navigation of said waters."*

By section 2 of the Amendatory Act of June 29, 1853 (Laws 1853, c. 471), the privilege was extended to such companies of erecting or constructing their lines "upon, over or under any of the public roads, streets and highways, and through, across, or under any of the waters" of the State, subject to the same restrictions contained in the act of 1848.

By § 1 of the act of June 10, 1881 (Laws 1881, c. 483), amendatory of the preceding acts on this subject, it was provided as follows:

1. Any company or companies organized and incorporated under the laws of this State for the purpose of owning, constructing, using and maintaining a line or lines of electric telegraph within this State, or partly within and partly beyond the limits of this State, are hereby authorized, from time to time, to construct and lay lines of electrical conductors *underground* in any city, village, or town within the limits of this State, *subject to all the provisions of law in reference to such companies not inconsistent with this act: Provided*, that such company shall, before laying any such line in any city, village, or town of this State, first obtain from the common council of cities, the trustees of villages, or the commissioners of highways of towns, *permission* to use the streets within such city, village, or town for the purposes herein set forth.

The foregoing embraces the material parts of the statute law of New York relating to telegraph companies, in force when the relator was organized.

Within a few months after the relator was incorporated, to wit, April 10, 1883, the board of aldermen of the city of New York adopted resolutions giving to the relator permission to lay its wires underground through the city, in accordance with certain restrictions and upon conditions particularly specified. The material portions of these resolutions were as follows :

Resolved, that permission be and hereby is granted to the New York Electric Lines Company to lay wires or other conductors of electricity in and through the streets, avenues and highways of New York city, and to make connections of such wires or conductors underground by means of the necessary vaults, test-boxes, and distributing conduits, and thence above ground, with points of electric illumination or of telegraphic or telephonic signal, in accordance with the provisions of an "ordinance to regulate the laying of subterranean telegraph wires and electric conductors in the streets of the city," passed by the common council and approved by the mayor, December 14, 1878; *provided*, however, and it is hereby ordained and

Resolved, that whenever the said New York Electric Lines Company, in the progress of laying its lines of electric conductors, shall be prevented or obstructed from placing its wires in the spaces which may have been generally selected under the ordinance, passed and approved as aforesaid, by manholes of sewer, gas, steam or water mains, or other underground or pavement impediments, now and heretofore existing, then and in such cases, the said company may, under the privileges hereby granted, vary the space selected, by adopting, appropriating, and using equivalent and nearest practicable spaces as may be found necessary; and *provided further*, and it is hereby further

Resolved and ordained, that the connection vaults or test-boxes aforementioned, may be extended underground not more than four feet in depth or two feet in any lateral direction beyond the limited spaces contemplated for the lines of wires, in the ordinance passed and approved as aforesaid, and may be fitted with covers, or other means of access, at the level of the pavements of the several streets and avenues.

Then follow several paragraphs of the ordinance relating to the compensation to be paid by the relator for the franchise thus given to it.

The ordinance of December 14, 1878, referred to in the first paragraph of that of 1883, as regulating the conditions and limitations upon which the franchise was granted, was as follows :

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No telegraph line or electric conductor shall be laid under the streets of this city at such depth from the surface that the necessary excavation incident to laying or repairing the same shall expose or endanger any water or gas pipes, sewers, or drains, or any parts thereof.

Such wires or conductors shall in no case be placed at a greater distance from the curbstone separating sidewalks from carriage way than four feet, except in crossing streets running transverse to the direction of said lines, when such crossing shall be made in the shortest straight line or in making necessary connections with buildings and stations.

The method employed in laying said conductors shall be such that it will at no time be necessary to remove so much of the pavement; or to make such excavation as to *materially impede traffic or passage upon sidewalks or streets during operation of laying or repairing said conductors*, except when in crossing streets transversely, where it shall be permitted to remove the paving stone for a width not exceeding two feet, and in the nearest straight line from corner to corner. In no case during the general hours of passage and traffic shall passage be interrupted thereby for a longer period than one hour.

The work of removal and replacement of the pavements in any and all of the streets, avenues, highways and public places in and through which the wires of any telegraph company shall be laid shall be subject to the control and supervision of the commissioner of public works. Excavations in any and all of the unopened streets, avenues, highways or public places shall also be subject to like control and supervision.

The place selected for placing said wires, in every case being limited as to direction and general position by the foregoing provisions, shall not exceed two feet in width by two feet in depth.

Grantees under this ordinance shall be required within six months after such permission shall be granted to file with the county clerk maps, diagrams, and tabular statements, including the amount and position of the spaces proposed to be occupied by them, and their rights and privileges under this ordinance shall be confined to the spaces, positions and localities as indicated by said maps, diagrams and statements.

On the 16th of April, 1883, the relator accepted the franchises granted to it by the resolutions of the 10th of that month, and on the 18th of May of the same year, it filed in the office of the clerk of the county of New York, a map, diagram and tabular statement, indicating the amount and position and localities of the spaces it proposed to occupy in and under the streets and other land in the city and county of New York. The petition avers that the relator immediately thereafter proceeded to make ready its material and plant for the construction of its electrical conduc-

tors and underground lines in the city, and began to develop and elaborate its mechanical constructions for the same, and to make ready the machinery, appliances and implements for its works, in pursuance of the objects of its incorporation, and at great expense; that since then it had purchased and partly paid for and become obligated to pay the sum of \$50,000 and upwards for property essential to the execution of its rights under the aforesaid laws and ordinances; and that more than 3,000 shares of its capital stock, of the par value of \$100, had been issued by it and sold to persons who had relied upon its said franchise.

It seems, however, that notwithstanding the acts done by the relator, as above averred, it took no steps towards opening up the streets and avenues of the city for the purpose of laying its wires and other electrical connections underground, until on or about July 21, 1886, when it made an application to the commissioner of public works for a permit to be allowed to make the necessary excavations, &c., for such purpose, which application was denied by the commissioner on the 23rd of the following month. This denial, as already stated, was made because the relator had not obtained the approval of the board of commissioners of electrical subways, created by the act of the New York Legislature, approved June 13, 1885 (laws 1885, c. 499), of the plans and construction proposed by the relator.

As this act of the Legislature has a very important bearing upon the material questions in this case, it will be necessary to refer more particularly to it. Its first section authorized and directed the mayor, comptroller and commissioner of public works of cities having more than one million population to appoint three disinterested persons, residents of the city for which they should be appointed, to be a board of commissioners of electrical subways. By its second section it was made the duty of such board to cause all electrical wires and other conductors of electricity to be removed from the surface and placed underground wherever practicable, and to require all electrical com-

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panies operating or intending to operate electrical conductors in any street, avenue or highway of the city to transact their business by means of underground conductors wherever practicable. Its third section provided as follows :

Sec. 3. When any company, operating or intending to operate, electrical conductors in any such city shall desire or be required to place its conductors, or any of them, underground in any of the streets, avenues or other highway of any such city, and for that purpose to remove the same from the surface thereof, and shall have been duly authorized to do so, it shall be obligatory upon such company to file with said board of commissioners a map or maps, made to scale, showing the streets or avenues or other highways which are desired to be used for such purpose, and giving the general location, dimensions and course of the underground conduits desired to be constructed. Before any such conduits shall be constructed it shall be necessary to obtain the approval by said board of said plan of construction so proposed by such company ; and said board has and shall have power to require that the work of removal and of constructing every such system of underground conductors shall be done according to such plan so approved, subject at all times to such modifications as shall from time to time by the board be made, and subject also to the rules and regulations, not inconsistent herewith, prescribed or to be prescribed by the local authorities having control of such streets, avenues or other highways of such city.

Various other duties were devolved upon this board by the subsequent sections of the act, but they need not be referred to in this connection. This act of 1885 was amended in certain particulars, also not material to the questions involved in this case, by the act of May 29, 1886 (laws 1886, c. 503). The only other section of the statute necessary to be mentioned is section 7 which, as amended, is as follows :

The amount of such salaries and expenses [of the board of subway commissioners] shall, in such proportion as is prescribed in section eight of this act, be by the comptroller assessed upon and collected from the several companies operating electrical conductors in any such city of the State which, under the provisions of this act, are or shall be required to place and operate any of their conductors underground, and shall be paid into the treasury of the State, in such installments as the comptroller shall require.

After the refusal of the commissioner of public works to issue the permit above mentioned, the relator applied to the Common Pleas Court for a peremptory mandamus to compel him to issue it, with the result as stated in the opening paragraphs of this statement.

E. M. Marble, for plaintiff in error.

James C. Carter and *Melville Hgleston*, by leave of court, filed an intervening brief on behalf of the Metropolitan Telephone and Telegraph Company.

David J. Dean (with whom was *James Hillhouse* on the brief), for defendant in error.

Justice LAMAR, after stating the case, delivered the opinion of the court: In the New York courts it was contended by the relator (1) that the aforesaid acts of the Legislature of that State, passed in 1885 and 1886, were not applicable to it because passed subsequently to the date of the alleged contract between it and the city, of April 16, 1883; (2) that if they were applicable to it, they were violative of the Constitution of the State of New York, for several reasons stated; and (3) that, if applicable, they also violated the Constitution of the United States in certain particulars specified. All of the points made by the relator were decided adversely to it in the State courts.

In this court, necessarily, the contention that the acts in question are violative of the Constitution of the State is not raised, as we would have no jurisdiction to consider such questions. The contention here, on the part of the relator, as gathered from the assignment of errors, may be thus stated:

(1) The acts of 1885 and 1886 are not applicable to the relator, for the reason urged before the courts of the State; and

(2) If they be held to apply to the relator they are violat-

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ive of the Constitution of the United States in two particulars: (a) They deprive the relator of its property without due process of law; and (b) they impair the obligation of the contract made between the relator and the city on the 16th of April, 1883, the date of the acceptance by it of the provisions of the city ordinance of the 10th of that month. All the other points raised may be arranged under one or the other of the above heads.

It will be convenient to consider the questions involved in this case in somewhat the above order. In no sense of the term do we think it can be safely averred that the acts of 1885 and 1886 are not applicable to the relator. The language of both of these acts clearly precludes such a construction. It is declared in the third section above quoted, that "*any company operating or intending to operate electrical conductors*" in the city shall be obliged to file with the Board of Subway Commissioners a "map or maps, made to scale," showing the proposed plan of construction of its underground electrical system; and shall also be obliged "to obtain the approval by said board of said plan of construction so proposed" before any underground conduits shall be constructed. The board is further given the power to compel the construction of the electrical system in accordance with the plans approved by it, and to modify, from time to time, those plans, if the public interest should require it. This language is plain and unambiguous, and is broad enough to include any and every electrical company, irrespective of the date of its incorporation, operating or desiring to operate, either directly or indirectly, any lines of wire for telegraphic, telephonic, or illuminating purposes within the cities to which it is applicable, the city of New York confessedly being the only one affected.

Neither can it be said that the acts of 1885 and 1886 have a retroactive effect, at least so far as the relator is concerned, since whatever rights it obtained under the ordinance of 1883, which it accepted as the basis of the contract it claims to have entered into, were expressly subject to regulation, in their use, by the highest legislative power in the State

acting for the benefit of all interests affected by those rights and for the benefit of the public generally, so long as the relator's essential rights were not impaired or invaded. *New Orleans Gas Company v. Louisiana Light Company*, 115 U. S. 650; *Stein v. Bienville Water Supply Company*, 141 U. S. 67.

In order to determine whether the relator's essential rights have been invaded, or the contract which it claims to have entered into impaired, or its property taken away without due process of law, it will be necessary to ascertain what rights and property it possesses under the alleged contract of April 16, 1883. This contract, if such it be, must be gathered from the statutes of the State, under which the relator was organized, and the ordinances of the city (which it accepted) by which its privilege of constructing an underground electrical system was conferred. Recurring to the general telegraph act of 1848 and the acts amendatory thereof and supplemental thereto, the material provisions of which are set out above, it is observed that in none of those acts is there any unqualified right conferred upon any electrical company to construct its lines wherever, or in whatever manner, it might choose. On the contrary, in every one of those acts provision is made for the security of the rights of the public in the use of the streets and highways which may be used by the electric companies. Thus in the act of 1848 the proviso is that the electric lines "shall not be so constructed as to incommode the public use of said roads or highways, or injuriously interrupt the navigation of said waters." Like restrictions are carried into the acts of 1853 and 1881; and the additional proviso is inserted in the act of 1881 that before any company shall be allowed to construct its lines in any city, village or town it must "first obtain from the common council of cities, the trustees of villages, or the commissioners of highways of towns, permission to use the streets within such city, village or town for the purposes herein set forth." Here, then, in express terms, the power is reserved to regulate the use by the electrical companies of all the public high-

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ways of the State ; and rights, conferred upon such companies are not absolute rights but the qualified right to construct their lines and operate them so as not to interfere with the public easements or the private rights of prior grantees.

Turning now to the ordinances of 1878 and 1883, the provisions of which were accepted by the relator on the 16th of April, 1883, which acceptance, it is claimed, constituted a contract between it and the city, we find that permission was given to the relator to lay its lines of wire underground in and through the city, in accordance with certain specified plans of construction. These plans are elaborately described in those ordinances ; the depth at which the wires are to be placed ; the distance the conduits, test-boxes and connection vaults must be placed from underground gas, sewer, steam or water mains ; the distance they are required to be from the curbstone ; and the method employed in the construction, are all specified with great particularity. And the supervision and control of these matters of excavation and construction, by the ordinance of 1878, devolve upon the commissioner of public works. Conceding, then, for present purposes, without deciding that such was the case, that the relator had a contract with the city of New York for the laying of its wires, and the construction of its underground electrical system, the terms of the contract, as found in the statutes and the ordinances, gave the relator only the right to carry out the purposes of its organization in a manner which will in nowise interfere either with other underground systems and connections, such as gas, sewer, and water systems, already established and in operation, or with the rights of the public to use the streets, avenues and highways of the city for the purposes of general travel. The rights of the public and the rights of prior occupants are to be respected and protected.

In what way, therefore, did the acts of 1885 and 1886 impair this contract ? Did they take from the relator any rights which it theretofore possessed ? Did they prohibit it from laying its lines and constructing its underground

electrical system in accordance with the terms, and subject to the restrictions and conditions, of its said contract with the city? We think all these questions must be answered against the relator. The only thing that the acts of 1885 and 1886 did in this matter was to create a board of subway commissioners, whose duty it was to carry out the provisions of the ordinances of the city and the prior acts of the Legislature relating to electric lines. The statutes of 1885 and 1886 did not prohibit the relator from carrying out the purposes of its organization or from laying its wires underground. They simply said to it, "Submit your plans and specifications of your electrical system to the board of subway commissioners, who will determine whether they are in accordance with the terms of the ordinances giving you the right to enter and dig up the streets of the city." This the statutes had a right to do. It would be an anomaly in municipal administration, if every corporation that desired to dig up the streets of a city and make underground connections for sewer, gas, water, steam, electricity or other purposes, should be allowed to proceed upon its own theory of what were proper plans for it to adopt, and proper excavations to make. The evils that would follow from such a system of practice would be of great gravity to the public and would entail endless disputes and bickerings with prior parties having equal rights. The utmost that can be said against the acts of 1885 and 1886 is that they transferred the supervision and control of the matters of excavation of the streets and the construction of underground electric systems from the commissioner of public works to the board of subway commissioners. That is the sum total of the change effected. Not a right of the electrical companies was violated, and no contract was impaired. The expressly reserved power of the State or municipality to regulate the use of the streets and highways in such manner as not to injuriously affect the public interests was merely transferred from one public functionary to another. The power was not enlarged; only the agency by which the supervising power of the State was to

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be exercised was changed. It requires no argument or citation of authorities to demonstrate that such proceedings did not impair the obligation of the relator's contract. If it did, every act of incorporation would involve a loss of authority by the Legislature to change its public functionaries, or their respective powers and duties.

Independently, however, of the contractual relations of the relator, the statutes of 1885 and 1886 are so clearly an exercise of the general police powers of the State that we do not deem it necessary to add anything on that point to what was said by the Court of Appeals of New York. 107 N. Y. 593, 603, 604.

The contention that the statutes referred to deprive the relator of its property without due process of law is equally without foundation. This argument rests upon the assumption that the Legislature could not require the electric companies to pay the salaries of the subway commissioners, as provided in section 7 of the act of 1885, as amended in 1886; and that this requirement of the statute is in violation of the fourteenth amendment to the Constitution of the United States. This contention cannot be sustained under the principles of *Charlotte, etc., Railroad v. Gibbes*, 142 U. S. 386. In that case it was held that a statute of South Carolina, requiring the salaries and expenses of the State railroad commission to be borne by the several corporations owning or operating railroads within the State, was not in conflict with the fourteenth amendment, which provides that no State shall "deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

There are no other features of the case that call for special consideration.

Judgment affirmed.

NOTE.— For earlier cases in this series upon the statutes designed to compel the placing underground of electric wires in the larger cities of the State

of New York, see INDEX to volumes 2 and 3, title "New York Subways Act."

See also notes upon the same subject, vol. 2, page 310; vol. 3, pp. 120, 131, 141, 167.

THE TRUSTEES OF THE PRESBYTERIAN CHURCH OF TRENTON
v. THE STATE BOARD OF COMMISSIONERS OF ELECTRICAL
SUBWAYS AND THE TRENTON PASSENGER RAILWAY COM-
PANY (Consolidated).

New Jersey Supreme Court, July 17, 1893.

(55 N. J. L. 436.)

NEW JERSEY SUBWAYS ACT.—OVERHEAD WIRES.—POWER OF COMMISSIONERS.

The New Jersey Subways Act (Pamph. L., p. 78), the object expressed in the title of which is "the placing of electrical conductors underground," does not, nor was it under such title competent for the Legislature to, empower the board of subway commissioners to grant a franchise to erect poles and wires in streets. The office and effect of that legislation relate to the control and regulation of such franchises derived from other competent authority.

The fifth section of that statute forbids the maintenance of poles and overhead wires, even by companies duly authorized to maintain them, without the consent of the board of subway commissioners. The board could properly express its consent by resolution; which would, however, be ineffective, unless the franchise were independently granted by other and competent authority.

Case of this series cited in opinion: *State, Green, Pros., v. Trenton, ante*, p. .

Certiorari to review resolution of board of subway commissioners. Facts stated in opinion.

William S. Gummere, for plaintiff.

Chauncey H. Beasley and *James Buchanan*, *contra*.

The opinion of the court was delivered by *DEPUE, J.*:

The Trenton Passenger Railway Company (Consolidated) was formed by the consolidation of several horse railroad and street railway companies incorporated under the laws of this State, to wit, the Trenton Horse Railroad Company, the City Railway Company, the Hamilton Street Railway Company, and the South Clinton Avenue & Broad Street Railway Companies, by an agreement and act of consolidation dated September 21, 1891, and filed in the office of the Secretary of State of New Jersey, on September 30, 1891.

The Trenton Horse Railroad Company was incorporated by an act passed March 9, 1859 (Pamph. L. 1859, p. 286). By an ordinance approved January 1, 1891, the common council of the city of Trenton, assuming to act under an act of the Legislature approved March 6, 1886, empowering street railway companies to use electric or chemical motors or grip cables as the propelling power for their cars, by the consent of the municipal authorities (Rev. Supp., p. 369), adopted an ordinance granting to the company permission to use electric motors as the propelling power of its cars on all the lines in the city, to be supplied with electricity from overhead wires supported by poles, to be located under the supervision and direction of the city surveyor and the committee on railroads of the common council. On *certiorari* to test the validity of this ordinance, this court decided that the act of the Legislature under which the ordinance purported to have been passed did not authorize the erection of poles and the stretching of wires in a public street, and that the ordinance then in question was illegal. *Green v. Trenton*, 25 Vroom, 92.

Subsequently on the 2nd day of August, 1892, the Trenton Passenger Railway Company (Consolidated) applied to the State board of commissioners of electrical subways for a grant of the privilege to construct and maintain electric wires along, across, and above certain of the streets of the said city; and on the same day the State board of commissioners of electrical subways adopted the following resolution:

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Resolved, that the permission of this board be, and the same is hereby, given to the Trenton Passenger Railway Company, to construct and maintain electric wires through East State street, in the city of Trenton, from the corner of Broad and State streets to Chambers street; said wires to be suspended not less than twenty feet above the surface of said street, and to be used only for the purpose of operating the railway of said company, and to be constructed and maintained in conformity with the petition and map filed with this board by said company.

The prosecutors are the owners of a lot of land fronting on State street, a street through which the company is operating a street railway. The company acting under the above resolution have located and placed two poles within the curbline of the street, in front of and upon the premises of the prosecutors. The object of this writ is to test the validity of the said resolution of the board.

The board of commissioners of electrical subways was created by an act approved March 10, 1892, entitled "An act for the placing of electrical conductors underground in cities of this State, and for the creation of a State board of commissioners of electrical subways. (Pamph. L., p. 78.)

The proposition discussed by counsel was whether the act of 1892 conferred upon the board of commissioners power to make a grant of the franchise of the right to erect poles and wires in the street. The contention of the counsel of the prosecutors was that the act in question did not authorize the board to grant a franchise, and that the office and effect of that legislation relate to the control and regulation of such franchises derived from other competent authority. In this construction of the act we concur.

The object expressed in the title of the act is "the placing of electrical conductors under ground." Under this title it would not be competent for the Legislature to empower the commissioners to grant the franchise of erecting in the streets poles and wires for the transmission of electricity. Nor does the enacting part of the act purport to clothe the commissioners with any such power. By the second section it is made the duty of the board to examine the manner in which wires and cables for the transmission of electricity are

constructed and used in the cities of this State ; and whenever, in their judgment, the public welfare will be advanced by the removal of any wires, or of the poles used for the support of electric wires, from the surface of the street, to order such poles and wires to be removed from the surface of the streets and placed under the streets : And if the owner of such poles or wires shall not, on notice, remove them within a specified time, it is made the duty of the commissioners to remove such poles or wires from the streets without delay. This section also declares it to be the duty of the commissioners, whenever they determine that the public welfare will be advanced by the removal of such poles and wires from the surface of the street, to cause such electrical conductors or wires as thereafter shall be used in such city to be placed under ground, whenever, in their judgment, it is practicable so to do. Other parts of the act authorize the construction of electrical subways and underground conduits on plans to be approved by the commissioners, within which the wires or cables used for the transmission of electricity shall be placed.

Nowhere in the act is there any indication of a legislative intent to confer on this board power to make a grant of a franchise which shall operate *proprio vigore* to legalize the erection of poles on which electrical wires shall be suspended. The functions of the board of commissioners are simply supervisory, by way of control over the exercise of franchises derived from other legislative authorities to use, in the street of a city, wires and cable for the transmission of electricity. Under our construction of the resolution under review, it does not purport to grant to the railroad company the franchise of erecting poles in the streets.

The fifth section of the act provides that no telegraph, telephone, electric light, or other electric wire or cable shall thereafter be constructed along, across, or above the surface of any street or avenue in any city in this State until the board shall authorize such wires to be carried along, across, or above the surface of such streets or avenues. This section is simply prohibitory. It does not purport to

grant, or to empower the commissioners to grant, the franchise of erecting poles or wires above the surface of the street. It prohibits such erections without the consent of the commissioners, notwithstanding the person or corporation to whom such consent is given may have the franchise to make use of the street for that purpose. In this sense the subject-matter of this section is germane to the object expressed in the title of the act, and is relevant to the purpose for which this commission was established,—the inhibition of poles and wires above the surface of the street wherever public welfare will be advanced by placing the same underground.

The claim of the railroad company which probably induced the board to pass this resolution is, that the company has the franchise to propel its cars by electricity, in virtue of section 11 of the charter of the Trenton Horse Railroad Company, and, as incident thereto, has the right to erect poles and wires in the streets. However groundless this claim may be, the commissioners were not called upon to decide upon its sufficiency, and any decision the commissioners might make on that subject would not avail the company in any proceeding against it for an invasion of the rights of the public or private individuals, arising from an unlawful use of the streets. The resolution under review was an appropriate method of expressing the consent of the board to the erection of poles and wires above ground, in conformity with the fifth section of the act, and will operate to relieve the company from the interdict contained in that section. It can have no other effect. Whether acts done by the company under color of this resolution are an invasion of public or private rights, will depend upon the question whether such acts were lawful, independent of the resolution of the board, and that question is not before us.

The resolution is sustained.

NOTE.—The New Jersey Subways Act, under consideration in the above case, was repealed in 1894 (L. 1894, ch. 7).

In the same year a statute was enacted in Massachusetts, having for its object the placing underground of all electrical wires within a specified territory in the city of Boston, the same to be done gradually and to be completed before January 1, 1900. The statute provides for a "department of wires" in the city government, also for a "commissioner of wires" to be appointed by the mayor, subject to confirmation by the board of aldermen (acts 1894, ch. 454).

**PACIFIC POSTAL TELEGRAPH CABLE COMPANY V. JAMES
IRVINE ET AL.**

U. S. Circuit Court, Southern District of California, January 19, 1892.

(In Equity.)

(49 Fed. Rep. 113.)

POLES AND WIRES IN HIGHWAY.—ABUTTING OWNERS.

The erection of poles and stringing of wires thereon for telegraph purposes imposes a new burden, for which the abutting owner, in whom is the title to the soil of the highway subject to the easement for public travel, must be compensated.

MOTION for injunction. Facts stated in opinion.

George Heyford, for complainant.

Wilson & Lamme, for defendants.

Ross, District Judge: There are two very substantial reasons why the motion for an injunction herein should not be granted.

* * * * *

2. The papers submitted upon the motion show that the telegraph poles and wires in question were erected by complainant upon land, the fee of which is in the defendant James Irvine, and over which the right of way for a public

road had been theretofore granted to the board of supervisors of the county in which the land is situate. It appears that the poles and wires were erected by complainant under a grant from the board of supervisors so to do, but without the consent and against the protest of the defendants. The right of way granted to the supervisors was for a public road, that is to say, a way to be used by the public for ordinary travel. Where the fee of the highway is vested in the public, there can be no valid legal objection to the grant by the public of a right to erect such poles and wires without regard to the adjacent property holders; but where, as here, the fee of the highway remains in the adjacent owner, and only its use for purposes of public travel has been granted, I think it clear that every use of the highway not in the line of such travel is an additional burden, for which the proprietor of the fee is entitled to additional compensation, and which cannot be constitutionally taken from him without his consent, except by proceedings regularly instituted and prosecuted according to law.

Motion denied.

NOTE.—See note to *Green v. City & Suburban Ry. Co.*, *post*.

BENJAMIN F. RUGG v. COMMERCIAL UNION TELEGRAPH COMPANY.*Vermont Supreme Court, March 29, 1894.*

(46 Vt. 208.)

TELEGRAPH LINE. -- ABUTTING OWNER. -- CONSTRUCTION OF STATUTE.

Under certain statutes in Vermont, held that telegraph companies have the right to erect and maintain their lines in and along any highway without obtaining consent to do so from any one, provided the convenience of the public in traveling, and the repairing of the highway, are not thereby interfered with, and the same are not erected in and along the streets of a village, or in front of or near a dwelling, or so that it become necessary to cut or injure trees.

Except in such cases, selectmen are not authorized to award damages to owners or occupants of adjacent land.

APPEAL by plaintiff from a decree dismissing a bill for an injunction, at the instance of the owner of land abutting upon a highway, restraining the erection of a telegraph line along the highway, until after the payment of an award which the selectmen of the town had made to the plaintiff.

Farrington & Post, for the orator.

Wilson & Hall, for the defendant.

START, J. : The orator seeks to recover the sum of five hundred dollars, awarded to him by the selectmen of the town of St. Albans as damages on account of the erection of a telegraph line in and along a public highway adjacent to his lands.

R. L., sec. 3633, provides that persons associated together to erect a line of telegraph wires in this State may set, erect and maintain the posts and other necessary fixtures there-

for in and along any highway ; but the same shall be done so as not to interfere with the public convenience in traveling on such highway, or in repairing the same.

R. L., sec. 3634, provides that, if it is found inconvenient or inexpedient to erect such telegraph wires, agreeably to section 3633, the selectmen of the town where such difficulty arises shall determine, on application, where and in what manner such wires shall be erected, giving notice to the parties interested, and shall certify their decision and cause the same to be recorded in the town clerk's office.

R. L., sec. 3635, provides that, if it is found desirable to erect such line of telegraph in and along the streets of a village, or in front of and near residences of any persons, and such persons object thereto, they may apply to the selectmen of such town, or officers of such village, who shall determine through what streets the same shall pass, or in what manner, if at all, such objections may be obviated ; and such decision shall be final, notice being given as required in section 3634.

R. L., sec. 3637, provides that, when in the erection of a telegraph line, the owner or occupant of lands or tenements sustains, or is likely to sustain, damages thereby, the selectmen of the town shall appraise such damage, and the same shall be paid before the line is erected.

Without deciding what rights telegraph companies have under these enactments, we think it clear that the Legislature intended that they should have the right to erect and maintain telegraph lines in and along any highway without obtaining consent to do so from any one, provided the convenience of the public in traveling and the repairing of the highway are not thereby interfered with, and the same are not erected in and along the streets of a village or in front of or near a residence. *Western Union Tel. Co. v. Bullard et al.*, 65 Vt. 634. Selectmen are not given authority or jurisdiction in respect to such lines, and if they have power to make a valid assessment of damages, such power is limited and restricted to such lines and parts of lines as come within the exceptions provided for in these enactments, viz., high-

ways where it is found inconvenient or inexpedient to erect such lines without interfering with the public travel or the repairing of the highway, and when objections are made to erecting lines in and along the streets of a village or in front of or near a residence.

Section 3633, as amended by No. 32 of the acts of 1888, provides that telegraph and telephone companies, in constructing and maintaining their lines, shall not cut or injure any tree without the written consent of the adjoining land owner or occupant, unless the selectmen of the town, or trustees of the village, or aldermen of the city, where such tree is situated, shall decide, after due notice to the owner or occupant of the time and place of hearing, that such cutting or injury is necessary; and they shall pay such damages as said selectmen, trustees or aldermen shall award for the same. From this enactment it would seem that the Legislature did not understand that selectmen were authorized to award damages to owners or occupants of land, except in those cases where they are given jurisdiction to locate the line. If they had general authority to award damages in all cases to adjoining owners or occupants of lands, then this enactment, so far as it relates to the assessment of damages, was unnecessary. The more reasonable construction to be given to these enactments is, that section 3637 does not authorize selectmen to assess damages to owners or occupants of adjoining lands or tenements, except in those cases where it becomes inconvenient or impracticable to erect a line without inconvenience in traveling upon and repairing a highway, and where it becomes desirable to erect a line in and along the streets of a village or in front of or near a residence, and objections are made.

Section 3637 must be construed in connection with preceding sections which relate to the power and jurisdiction of selectmen in the location of telegraph lines; and, when so construed, it is clear that the Legislature considered that there might be places upon highways where it would be impracticable to erect a telegraph line without inter-

fering with the traveling public and the repairing of the highway, and that there might be valid objections to erecting a line along the streets of a village or in front of or near a dwelling house; and, for such cases, it provided that selectmen or village officers should be called upon to locate the line and determine how objections could be obviated, and that selectmen should assess damages. Whether these provisions are sufficient to authorize selectmen to make a valid assessment of damages in the exceptional cases provided in these enactments we do not decide. The orator's case does not fall within any of the exceptions. It does not appear that, in the erection of the line in question, it became inconvenient or inexpedient to erect it without inconvenience in traveling or in making repairs, nor does it appear that the line was erected in or along the streets of a village, or in front of or near a dwelling, or that it became necessary to cut or injure trees. The burden was on the orator to show that the selectmen had jurisdiction to make the award they did make. This he has not done. Therefore it must be held that the selectmen acted without authority, and that the award made by them is void.

The decree of the Court of Chancery is affirmed, and cause remanded.

NOTE.—See note to *Green v. City & Suburban Ry. Co.*, post.

The case of *W. U. Tel. Co. v. Bullard*, cited in the above opinion, arose under the same statute, but the only question in issue was as to the sufficiency of a pleading in an action to recover a penalty fixed by the statute for wilful interference with or injury to telegraph appliances. In the course of the opinion, however, the court used the following language, to which reference is made in the citation:

"A telegraph line may be erected and maintained over and upon a highway so as not to interfere with the public convenience in traveling thereon or in repairing the same without cutting or injuring trees, and without objection or claim for damages being made. Such a line is authorized by this chapter, and may be erected and maintained by a telegraph company in pursuance thereof, without obtaining permission to do so from anyone."

**H. WILSON BLASHFIELD, Respondent, v. THE EMPIRE
STATE TELEPHONE AND TELEGRAPH COMPANY, Appellant.**

N. Y. Supreme Court, Gen. Term, 4th Dept., Sept., 1893.

(71 Hun, 532.)

TELEPHONE LINE IN STREET.—ABUTTING OWNER.

The construction of a telephone line by the erection of poles and placing wires thereon within the limit of a country highway, constitutes an additional burden upon the fee of adjacent lands extending to its center, not contemplated or included in the original dedication or appropriation of the land for highway purposes.

APPEAL from judgment of Supreme Court, Cortland county, upon report of referee.

The omitted portion of the opinion, stating the ground for reversal of the judgment, related to the action of the referee in striking out certain evidence upon his own motion after the case had been submitted for his decision, no such right having been specially reserved.

Frederick E. Stroke, for the appellant.

Franklin Pierce, for the respondent.

HARDIN, P. J.: An opinion was delivered by the learned referee, in which he states: "The principal question in this case, and the first one to be met and disposed of, is whether or not the construction of a telephone line by the erection of poles and the placing of wires thereupon within the limits of a country highway, constitutes an additional burden upon the fee of adjacent lands extending to its center, not contemplated or included in the original dedication or appropriation of the land for highway purposes." Upon the question the learned referee concludes a lucid

opinion as follows: "That the construction of defendant's telephone lines did impose an additional burden upon the fee of the highway for which the owner was entitled to compensation." Since the learned referee's opinion was written, the case of *Eels v. American Telephone and Telegraph Co.* 48 N. Y. St. Repr. 303; S. C., 20 N. Y. Supp. 600, has been decided by the fifth department, and in that case it was held: "The occupancy of a highway by the poles of a telegraph or telephone company is not one of the ordinary and legitimate uses for which highways are established, and is the imposition of an additional burden on, and the taking of, the property of the owner of the fee, which enables him to maintain an action to compel the removal of the poles, and to recover possession of the premises occupied thereby, with damages, where such occupancy is without his consent and without compensation having been previously made him therefor."

* * * * *

NOTE.—The *Eels* case, above referred to, has been affirmed by the Court of Appeals (148 N. Y. 133). The opinion will be printed in the next volume of this series.

See note to *Green v. City & Suburban Ry. Co.*, *post*.

HAVERFORD ELECTRIC LIGHT COMPANY V. HART.*Montgomery Co. (Pa.) Common Pleas, March 7, 1892.*

(18 Pa. Co. Ct. R. 309.)

ELECTRIC LIGHT FIXTURES IN STREET.—ABUTTING OWNER.—INJUNCTION.

The use of highways for maintenance of electric light appliances is not within the purposes of public travel contemplated at the original dedication. Such use cannot be made of a highway to the injury of an abutting owner, without compensation being made to him.

Cases of this series cited in opinion: *Lookhart v. Craig Street Railway Co.*, vol. 3, p. 314; *Broome v. N. Y. & N. J. Teleph. Co.*, vol. 3, p. 259; *Chesapeake & Pot. Teleph. Co. v. Mackenzie*, vol. 3, p. 195; *Pierce v. Drew*, vol. 1, p. 571.

MOTION to dissolve preliminary injunction. Facts stated in opinion.

Henry C. Boyer, for plaintiff.

Charles Hunsicker, for defendant.

SWARTZ, P. J.: The complainant's bill sets forth that the Haverford Electric Light Company was incorporated under the act of the 29th of April, 1874, and the several supplements thereto, to furnish electricity to the public, in the township of Lower Merion, for the purpose of light, heat and motive power. It is also shown that the complainant company surrendered its charter under the provisions of the act of May 8, 1889, (P. L. 136,) and received new letters patent under the said act.

The company erected an electric plant at Haverford College Station, in said township of Lower Merion. Poles were erected on the sides of the public highways, whereby the electric wires are supported which supply or carry the

electricity to the consumers. There are no cities or boroughs within the township limits, but the poles were placed within the limits of the public highways by permission of the township supervisors. A line of poles was erected on Montgomery avenue, one of the public roads of said township. Three of the poles of this line were placed in front of defendant's property but within the limits of the highway, and a few feet from defendant's fence line. The street or road is forty feet wide. The defendant, William R. Hart, cut down these poles; the company replaced them, and then secured a preliminary injunction to restrain him from further interference with the poles. The injunction was to continue for five days, unless cause be shown for its further continuance. The poles have been in use since July, 1891, except during the period of Mr. Hart's interference. Shall we allow the defendant to remove the poles?

Counsel for complainant in his argument contends that William R. Hart's title does not extend to the middle of the highway. Under the affidavits before us this ownership to the middle of Montgomery avenue is either in Mr. Hart or his lessor, Mrs. Ashbridge. The real parties in interest are therefore represented before us.

Counsel for defendant claims that the poles in controversy should have been located on the other side of the avenue, because the opposite owner is a customer of the company while the defendant is not. If the company has the right to occupy the sides of the road for its poles, we cannot say that their present location shows such an abuse of discretion as to call for judicial interference.

William R. Hart, the defendant, is the owner of a country residence. The buildings stand back some distance from Montgomery avenue. He alleges that these poles disfigure his property and greatly depreciate its market value. Numerous other affidavits are filed which sustain this view.

The owner of land traversed by a public road has the right to use the land on which the road is located for any purpose that will not impede or interfere with the public travel. The fee still remains in the land owner, and the

public acquire no more than the free and uninterrupted use of the highway for the purposes of passage. For such use he was compensated. If any additional servitude is imposed, for purposes distinct from the use of the land as a highway, additional compensation must be made. It is said that the electric railways may locate their poles on the streets of a city without any compensation to the abutting owners. *Lockhart v. Craig Street Railway Company*, 139 Pa. 419. Suppose this rule is applicable to a country road, how does it meet complainant's case? Street railways, whether propelled by horses or electricity, use the highway for the purpose of passage. We may say such use is in accord with the original design of the road; it is but a means of public transportation and accommodation. When compensation for use of the land was made the owner was bound to recognize that his property would be subjected to any method of passage that is developed in the progress of time, and the use of the road for the cars carries with it the use of the proper apparatus for moving them.

But what connection has an electric light company with the original design or purpose of a public road? There is nothing in the system of lighting by electricity that requires a public highway. The poles might be placed outside of the roads and answer every purpose. The act of May 8, 1889, allows such companies to enter upon any public street, lane, alley or highway, because the streets afford a convenient location or perhaps because such method may cause the least injury to private property. Whatever the purpose of the Legislature may have been, it seems clear to us that the use which an electric light company makes of a public highway has no connection with the purposes of a public road, and was not a use in the contemplation of the owner of the land and the public authorities when the land was appropriated.

The poles occupy the defendant's ground, and, if any injury is done, the constitutional provision requires just compensation to be made. We cannot distinguish this injury from that which is occasioned by the laying of gas

pipes in a public road for the purposes of carrying natural gas from the well to a city some miles away. The latter injuries may differ from the former in degree but not in kind. Such gas pipes may not be laid without first paying or securing compensation to the abutting land owner. *Sterling's Ap.*, 111 Pa. 40. Poles with their hanging wires and cross-arms often work greater injury to a property than a gas pipe buried under the road-bed. Ground is occupied, trees along the highway are interfered with, access to the property is impeded, the view is obstructed, and an unsightly structure is presented to the eye. These are matters of considerable moment, when, as in the present case, the abutting owner is the occupant of a fine suburban mansion.

Telegraph and telephone companies may not occupy the sides of a highway without making compensation. *Broome v. New York and New Jersey Telephone Co.*, 42 N. J. Equity, 141; *Chesapeake Telephone Co. v. Mackenzie* (Md.), 21 Atl. 690. In Massachusetts it was held by a majority of the court that roads and streets may be used for telegraph poles without any liability to compensate abutting owners. The decision was based upon the conclusion that such "use is certainly similar to, if not identical with, that public use of transmitting information for which the highway was originally taken." *Pierce v. Drew*, 136 Mass. 81. As already shown, this plea can have no application to electric light companies.

We conclude that the defendants are entitled to such damages as they may sustain by the location of the poles and wires of plaintiff company. We add what was said in *Sterling's Ap.*, *supra*. "As to streets and alleys in cities and boroughs, there are reasons why a different rule to some extent should prevail."

And now, March 7, 1892, the injunction heretofore awarded will be dissolved unless the complainants will within fifteen days from this date tender to the defendants a bond in \$1,000 with surety conditioned for the payment

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of such damages as may be legally recovered against them by the said defendants by reason of the *erection* of the poles aforesaid.

NOTE.— See note to *Green v. City & Suburban Ry. Co.*, *post*.

HENRY S. HEILMAN ET AL. V. LEBANON & A. STREET RAILWAY CO.

Pennsylvania Supreme Court, Jan. 4, 1892.

(145 Pa. 33.)

ELECTRIC RAILWAY.— ABUTTING OWNERS.— CONSTITUTIONAL LAW.

Appeal from order vacating preliminary injunction restraining erection of electric railway upon rural highway without compensation to abutting owners, dismissed; the statute under which defendants operated not providing for such compensation; and the court believing that the merits should be considered upon final hearing.

APPEAL from order dissolving preliminary injunction restraining the erection of an electric railway in a rural highway without compensation to abutting owners.

The plaintiff also attacked the constitutionality of a statute (Act of May 14, 1889), under which the defendant was proceeding, upon the ground that it provided for no compensation to abutting owners.

Bassler Boyer, for appellants.

S. P. Light and *C. H. Killinger*, for appellee.

PER CURIAM: Without intimating any opinion as to the merits of this case, we think it should proceed to final hearing, in order that the facts may be more fully devel-

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oped. It appears to present a question which, in some of its aspects at least, may be regarded as a new one.

Order affirmed, and appeal dismissed.

NOTE.—The decision of this case by the court below (10 Pa. Co. Ct. Rep. 241), is cited in *Cent. Pa. Teleph., &c. Co. v. Wilkesbarre, &c. Ry. Co.*, post, as authority for the proposition that the electric street railway does not impose a new servitude for which the abutting owner is entitled to compensation. Also in *Delaware, L. & W. R. Co. v. Wilkesbarre, &c. Ry. Co.*, the same decision is cited.

See note to *Green v. City & Suburban Ry. Co.*, post.

FREDERICK WILLIAM KOCH ET AL. V. NORTH AVENUE
RAILWAY COMPANY OF BALTIMORE CITY.

Maryland Court of Appeals, Jan. 28, 1892.

(75 Md. 222.)

ELECTRIC STREET RAILWAY.—MUNICIPAL CONTROL.—CONSTRUCTION OF
ORDINANCE.—INJUNCTION.—ABUTTING OWNERS.

Ordinance permitting street railway company to lay tracks, and to use tracks of other companies, construed.

The use of streets for electric street railways does not impose a new servitude for which abutting owners are entitled to compensation.

Therefore where permission has been given by municipal officers, pursuant to statutory authority, abutting owners are not entitled to injunction.

Cases of this series cited with approval: *Taggart v. Newport St. Ry. Co.*, vol. 8, p. 806; *Halsey v. Rapid Transit St. Ry. Co.*, vol. 8, p. 283; *Williams v. City Elec. Ry. Co.*, vol. 8, p. 281; *Lockhart v. Craig St. Ry. Co.*, vol. 8, p. 314.

APPEAL by plaintiff below from judgment of Circuit Court, Baltimore City, refusing injunction. Facts stated in opinion.

E. J. D. Cross, and *Bernard Carter* (with whom were *Hugh L. Bond, Jr.*, and *John K. Cowen*, on the brief), for the appellants.

Francis K. Carey, and Fielden C. Slingluff (with whom was *Julian I. Alexander* on the brief) for the appellee.

ROBINSON, J., delivered the opinion of the Court: This is a bill by abutting lot owners to enjoin the defendant, a street railway company, from constructing its road on North avenue; and the questions are:

First. Is the defendant a lawfully incorporated company?

Secondly. If incorporated, has it the legal right to lay tracks of its own outside of the tracks already laid on said avenue by other railway companies?

Thirdly. Have the city authorities the power to authorize the defendant to use electricity as a motive power in propelling its cars?

Fourthly. Is the elevated structure proposed to be built down North street an "elevated road" within the meaning of the statute which provides that no elevated road, or any other railroad than a surface road, shall be built in or through the City of Baltimore, except under a special charter granted by the Legislature? Section 186, Art. 23, of the Code.

* * * * *

Being, then, lawfully incorporated, the question is whether the defendant has the legal right to construct its own tracks outside of the existing tracks on North avenue. And this depends upon the construction of ordinance No. 23, known as the "North-Avenue Ordinance." This ordinance is entitled "An ordinance to authorize the construction of city passenger railway tracks by the North-Avenue Company of Baltimore City, on North avenue to Guilford avenue." And section 1 provides that "the North-Avenue Railway Company of Baltimore City be, and it is hereby, authorized to lay down and construct double iron railway tracks for the purposes of its business, and in connection with double tracks now authorized to be constructed by it on North avenue to McCullough street," etc.

That this section, standing alone, authorizes the defendant to construct outside tracks of its own cannot, it seems to us, be questioned. It cannot be questioned, because the right to do so is granted in terms which exclude all contention. But this right, it is said, is not only restricted, but actually taken away, by the third section. Now what is this section? It reads as follows:

That it shall be lawful for the said North Avenue Railway Company of Baltimore City to use the tracks now laid on North avenue by the Baltimore City Passenger Railway Company, * * * in the manner and to the extent to which it is lawful for the mayor and city council of Baltimore to grant the right to use said tracks; and in any case in which the said railroads are entitled to the exclusive use of said tracks, and the North Avenue Railway Company cannot agree with them for the joint use of their said tracks, then it shall be lawful for the North Avenue Railway Company to lay its rails inside and outside of said tracks of other roads.

This section, it is argued, makes it obligatory upon the defendant to use the tracks of other railway companies on North avenue, provided the city authorities have the power to grant such right; and if they have no such power, and the defendant is unable to agree with these companies for the joint use of their tracks, then the defendant is authorized to lay its rails inside and outside of the tracks of such companies; and that under no circumstances has it the right to lay *outside tracks of its own* on North avenue; in other words, that this right, if granted by the first section, is revoked by implication by the third section. This construction cannot be supported, it seems to us, unless we import into this section language not to be found in it, or construe the language used in a sense altogether different from its plain and obvious meaning. The words "*it may be lawful*," as here used, are to be construed in their natural and ordinary sense as being *permissive*. "They are words," as was said by Lord CAIRNS in *Julius v. Lord Bishop of Oxford*, 5 Appeal Cases, 214, "merely making that legal and possible which there would otherwise be no power, right or authority to do. They confer a faculty or power, and they do not of themselves do more

than confer a faculty or power." The words "it shall be lawful" being, according to their natural meaning, *permissive* words only, it lies upon those who contend that an obligation exists to exercise this power to show, in the circumstances of the case, something which creates this obligation.

It can hardly be said there is anything in the objects or purposes for which this section was added to the ordinance to justify the construction of these words in any sense other than their natural and ordinary sense. By the first section the defendant was only authorized to lay outside tracks of its own on North avenue; but being an electric street railway, operated by what is known as the "*overhead system*," there are certain mechanical advantages to be derived by the occupation of the center of a broad street like North avenue. The construction of its tracks on the slope of the street towards the curb line would tend to throw the weight of the car on the outside wheels, and thereby make an imperfect contact for the *trolley wheel* on the *trolley wire*. And the third section was passed for the purpose of giving to the defendant the right to use the existing tracks of other companies; and if the city authorities had no power to authorize the joint use of these tracks, and no agreement could be made with the companies for their use, then the defendant was authorized to lay its rails *inside and outside of such tracks*. The object, and sole object, of this section was, it seems to us, to grant these additional rights to the defendant, and not to restrict or qualify in any manner the right which had been granted by the first section to lay tracks of its own on North avenue, should the defendant deem it best to do so.

And this brings us to the question as to the power on the part of the city authorities to permit the use of electricity for propelling street cars. This question comes before us for the first time, but it has been fully considered by the highest courts in other States, and these courts, without a single exception, have held it to be a *legitimate use* for this purpose. It was so held by the Supreme Court of Rhode

in *Taggart v. Newport Street Railway Co.*, 16 N. J. 18; and by the Court of Chancery of New Jersey in *Green v. Rapid Transit Street Railway Co.*, 47 N. J. 1; and by the Circuit Court of the United States for the Eastern District of Arkansas in *Williams v. City of Little Rock Street Railway Co.*, 41 Federal Rep. 556; and affirmed by the Supreme Court of Pennsylvania in *Green v. Craig Street Railway Co.*, 139 Penn. St. 1. Without quoting at length from these several decisions, it is sufficient to say they proceed on the principle that a street is a way set apart for public travel, and that the use of electricity for propelling street cars is but a new and improved motive power, in no manner inconsistent with the uses and purposes for which streets were opened and dedicated as ways for public travel. Now, the act of 1870, confers upon the mayor and city council full power to authorize the use of electricity for propelling street cars; and, as this use does not impose a new servitude upon the streets so as to entitle abutting lot owners to any special compensation, the appellants, it is clear, are entitled to any relief in this respect.

* * * * *

This case is cited in the following cases in this volume: *Paterson v. Grundy*, post.; *Green v. City & Sub. Ry. Co.*, post.; *No. 1 Pass. Ry. Co. v. No. Av. Ry. Co.*, ante, p. 1. See also *Green v. City & Suburban Ry. Co.*, post.

FOX ET AL. V. CATHARINE AND BAINBRIDGE STS. RAILWAY COMPANY.*Philadelphia Co. (Pa.) Common Pleas, No. 4, July 9, 1892.*

(12 Pa. Co. Ct. R. 180.)

ELECTRIC RAILWAY.--ABUTTING OWNER.--INJUNCTION.

The maintenance in streets of an electric street railway, with poles and wires for the overhead trolley system, does not constitute a new servitude for which abutting owners are entitled to compensation. Accordingly, application for injunction restraining such maintenance denied. *Lockhart v. Craig Street Railway*, 8 Am. Elec. Cas. 314, followed.

BILL for injunction and answer. Facts stated in opinion.

Logan M. Bullitt and *Richard C. Dale*, for the plaintiffs.

Rufus E. Shapley, for the appellant.

ARNOLD, J.: This is a bill by property owners for an injunction to prevent the Catharine & Bainbridge Streets Railway Co. from constructing an overhead electric system for the propulsion of its cars. The company was formed by articles of association filed May 14, 1889, under an Act of Assembly approved the same day, providing for the formation of companies for constructing, maintaining and operating street railways for the conveyance of passengers by any power other than by locomotive. In the articles of association it is stated that "said road is to be operated by horse, cable or electrical power." On March 31, 1892, the city councils ordained "that permission be and the same is hereby granted to the Catharine & Bainbridge Streets Passenger Railway Co. to use electric motors as the propelling power of its cars on its tracks, as the same are now authorized to be laid * * * said

to be supplied from overhead wires, supported by poles not less than twenty feet high, which the said company is authorized to erect and maintain, and to be placed opposite each other within the curb lines and conform with street wires; or, at the option of the company, to be erected in the middle of the streets, with a double track thereon suspending the overhead construction. The same shall be under the supervision of the director of the department of public safety."

It will be seen that the company has authority of the consent of the city councils to construct an electric trolley system for moving its cars. No objection to the right of a company formed under an act of 1889, to operate, as well as construct, an overland electric railway, was made and overruled in the case of *Chart v. Craig St. Ry. Co.*, 139 Pa. 419, decided in 1891. It was there said by Judge STOWE, and affirmed by the Supreme Court, that, "recognizing the right of the Legislature and city authorities to authorize the running of railways upon the streets of a city, without compensation to property owners, because it is a means of transportation and accommodation, the necessary machinery and apparatus for moving them must be allowed to be used in an incident, unless there is something illegal in the construction and its use." Following the decision in *Chart*, we refuse the injunction and *dismiss* the company's bill.

See note to *Green v. City & Suburban Ry. Co.*, *post*.

GILLETT ET AL. V. CHESTER AND MEDIA RAILWAY COMPANY.*Delaware Co. (Pa.) Common Pleas, Aug. 1, 1892.*

(2 Pa. Dist. Rep. 450.)

ELECTRIC RAILWAY.—ABUTTING OWNERS.—STATUTORY CONSTRUCTION.—INJUNCTION.

A statute authorizing a street railway company to convey passengers "by any power other than by locomotive," construed to authorize the use of electricity.

The maintenance in streets of an electric street railway, with poles and wires for the overhead trolley system, does not constitute a new servitude for which abutting owners are entitled to compensation. Accordingly, application for injunction restraining such maintenance denied. Held, however, that the company must use such poles and so locate them as to create the least danger and obstruction in the street.

Lockhart v. Craig Street Railway, 3 Am. Elec. Cas. 314, followed as binding authority.

ACTION by abutting owners to restrain the construction of a street railway along the Providence road in Nether Providence township, and to operate it by the trolley system, upon the grounds that it would constitute a public nuisance, dangerous to life and property, and would decrease the value of plaintiff's property. It was claimed that the statute (act of May 14, 1889), under which defendant was proceeding, was unconstitutional. Prayer for injunction and general relief. Motion for temporary injunction.

Isaac Johnson, for plaintiffs

Geo. B. Lindsey and *Wm. B. Broomall*, for defendant

CLAYTON, P. J.: It is a well-settled principle of law that corporations, claiming to exercise the delegated powers of

must clearly show an express grant of the power or, at least, that it is necessarily implied and incidental to some clearly expressed grant of

powers claimed in this case rest upon the act of May entitled "An act to provide for the incorporation and government of street railway companies." Giving to this language a most liberal construction, the act is very loosely and slovenly drawn. The title is defective, and the ruling of the Supreme Court, perhaps not correct. To read this act by its title would convey no idea that it was to give power to build any kind of electric railways over the several highways of the State, and to obstruct them by reducing their width for common use and by planting poles in the part of the road not occupied by the tracks of the railway. The act says nothing upon the subject of the kind of motive power to be used. It does not clearly say that any motive power except that of horses or mules is to be used. No express right is given to plant poles, or in any manner to obstruct the highway except by its tracks and cars.

The act gives the right to construct a street railway and to use it by any power other than by locomotive. The word "locomotive" is certainly a locomotive power, and, therefore, the definition of the word, could not be used. Horses and mules are locomotive powers, but the act, I suppose, intends to exclude them. There is some authority for the word "locomotive" as meaning "a steam engine or an engine propelled by steam as its motive power." I suppose the court may safely construe the word "locomotive power," used in the act, as meaning every present known power of locomotion except

then these somewhat hypercritical objections, we have the principal one in the case. The great question is whether it is to obstruct other parts of the road than that actually occupied by the tracks, by planting poles and stringing

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electric wires thereon, to the danger and annoyance of travelers by horse, carriage, etc. If this were an open question we might hesitate in affirming the right claimed. No right of eminent domain has been granted to this company. If the planting of poles is a diversion of the uses for which this road was originally taken, then the owners of the fee, subject to the easement of a public road, have the right to additional compensation for the taking of their land, and its use for any other purpose than that of a public road would be a trespass, against which the company defendant should be properly enjoined.

The precise question, however, has been before the Supreme Court of the State and has been decided in favor of the company. *Lockhart v. Craig*, 139 Pa. 419.

Directly the contrary has been held by the highest court of New Jersey, but the lower courts of this State must follow the ruling of our own Supreme Court, where there is a conflict between its decisions and those of sister States.

The weight of authority in Pennsylvania being clearly in favor of the right claimed by the defendant, the injunction prayed for must be refused.

I am, however, of opinion that the right must be exercised so as to place as little obstruction as possible in the public road. The poles must be of the safest and best material, and be planted as near the outer lines of the road as possible. They must be of sufficient height and so constructed as to be the least objectionable and dangerous. If the company, in any particular, should fail to observe the suggestions above made, on bringing the matter to the attention of the court, an injunction will issue. As the matter now stands the injunction is refused.

NOTE.—See note to *Green v. City & Suburban Ry. Co.*, post.

**SELLS V. THE COLUMBUS STREET RAILWAY
COMPANY.***Franklin County (Ohio) Common Pleas, Sept. 19, 1892.*

(28 Weekly Law Bulletin, 172.)

ELECTRIC STREET RAILWAY.—ABUTTING OWNERS.

and maintenance of an electric street railway, with the poles necessary for the overhead trolley system, in a public highway, does not impose a new servitude for which the abutting owner is to compensation.

The abutting owner has no such proprietary interest in the use of a highway as the maintenance of a public market as will entitle him to an injunction restraining the construction and operation of an electric street railway, upon the ground that interference with the market will diminish the value of his property.

The abutting owner is not entitled to such injunction by reason of the fact (if it were true) that his right to use the street for the purpose of backing wagons from the street to the sidewalk may be interfered with.

See series cited in opinion: *Cincinnati Inc. Pl. Ry. Co. v. City & Hamilton St. Ry. Co.*, vol. 3, p. 448; *Mt. Adams & Eden Park Inc. Pl. Ry. Co. v. City & Hamilton St. Ry. Co.*, vol. 3, p. 262; *Pelton v. East Cleveland R. Co.*, vol. 3, p. 283; *Walsey v. Rapid Transit St. Ry. Co.*, vol. 3, p. 283.

As stated in opinion.

L. Converse and *G. J. Marriott*, attorneys for

Booth and *James Caren*, attorneys for defendant.

J.: The Columbus Street Railway Company has obtained from the city the franchise to lay out, construct and operate a street railway along the center of Fourth Street. It is now engaged in excavating, and laying its tracks across the street. The motive power to propel the cars is to be electricity. I have not seen the ordinance by which

the privilege was granted, but am informed that it is not limited to the use of electricity.

Neither the legality of the railway company's creation, nor the legality of the grant made by the city, are assailed by the plaintiff.

But he objects to the construction of the railway on other grounds. He is an abutting lot owner. He owns the fee in the street. He has peculiar rights in and to the street — rights which are different from, and independent of, the right which the public has in the street — the right of passage and repassage. There is the "easement of access, the easement of light and air, the right of passage to and from his lot, and to load and unload goods or merchandise, and to deposit building material in the street, and the right to mine, and to carry water in pipes, under the street, etc." This statement of his rights to the street which are necessary to subserve the reasonable use and enjoyment of his property is not intended to be exhaustive.

Constitutionally, these rights can not be appropriated or taken by a corporation for public use without compensation.

One of the contentions of the plaintiff is that the construction of the electric street railway will add a new servitude, a new burden, to the land originally appropriated for the street, and, as his compensation has not been first ascertained and paid, or secured to be paid, the construction of the railway should be enjoined.

If his minor premise is sound, he is entitled to the injunction, for if he has made out such a case, he *must* find his protection in the courts by injunction.

The exact, sharp and pointed question, whether an electric street railway in a public highway is an additional burden or servitude, has never been passed upon by our Supreme Court as between the street railway company and an abutting property owner. It was decided that an ordinary horse railway is not such a burden *per se*, and in a very recent case, it has touched the main question in this case in such a way that it is obvious that the decision would

an electric street railway is not, in itself, a new servitude. In that case the controversy was between a telephone company and an electric street railway company, and the court resolved that "new and improved modes of conveyance by street railways are by law authorized to be constructed." The court expressly declared, however, that it was not "necessary to determine how far a telegraph company making a lawful and careful use of its property, or of a franchise granted to it by the municipal authorities, may be held liable for damages accidentally caused to another." *Cincinnati Inclined Ry. Co. v. City and Suburban Telephone Co.*, 18 Ohio St. 390. The principle of the decision rendered in that case mentioned, *Cincinnati & Spring Grove St. Ry. Co. v. Cincinnati*, 14 Ohio St. 523, was broad and comprehensive enough to embrace this case. It was Judge Allen who discovered the principle.

In Circuit Court cases, the question has been directly and repeatedly decided, the decisions being the same, namely, that an electric street railway is not a new servitude. In one controversy was between an abutting lot owner and a company; in the other it was between a non-abutting owner and the company. *Mt. Adams & Eden Park Ry. Co. v. Winslow*, 3 C. Ct. Rep. 425; *City of Toledo v. Toledo*, 5 C. C. Rep. 124. See also *Clements v. City of Cincinnati*, 16 Bulletin, 355.

In the Common Pleas Court of Cuyahoga county, a similar conclusion was reached. *Pelton v. East Cleveland Ry. Co.*, 22 W. L. B. 67. The highest courts of several States have also decided that such a railway does not create a new servitude on the street ground. In Booth's "Law of Street Railways," sec. 83 and notes, there is an extensive citation of the authorities.

When the authority, then, the question is certainly settled. The argument for the plaintiff was wholly based on the analogy of the ordinary steam railroads constructed in the highways. The established law is that *they* create a new servitude; but analogies cannot control when the

Sells v. Railway Co.

travel on the street. The electric car does not occupy as much space longitudinally. It can be started sooner, can be moved more rapidly, and be stopped quicker. Booth's Law of Street Railways, sec. 83. That "loud, churning and pulsating noise" and its accompaniment, a "peculiar humming sound," have been reduced to a minimum, so that it is not any worse than a horse car. Its greater danger from the use of electricity has been probably exaggerated.

It was insisted that the wires and poles would impose a new servitude on the street. But they would not. They are no more a new burden than hitching-posts, shade trees and lamp posts would be. 3 C. C. Rep. 428.

In *Halsey v. The Rapid Transit Railway Company*, 20 Atl. Rep. 859, the prevailing notion was thus expressed: "They" (the wires and poles) "form part of the means by which a new power to be used in the place of animal power, is to be supplied for the propulsion of street cars, and they have been placed in the street to facilitate its use as a public way, and thus add to its utility and convenience. * * * The whole matter may be summed up in a single sentence: The poles and wires have been placed in the street to aid the public in exercising their right of free passage over the street. This being so, * * they do not impose a new burden on the soil, but must, on the contrary, be regarded, both in law and reason, as legitimate accessories to the use of the land for the very purpose for which it was acquired."

But none of these considerations can be predicated of steam railroads when laid out in a public highway. That is not where such roads are usually constructed. They do not facilitate the kind of public travel and transportation that go to the public streets. The length of their trains, their great noise, the time and space it requires to stop them, tend to drive off of the street public travel by other vehicles and by pedestrians. The two uses of the street cannot be harmonized. It is, therefore, an additional servitude on the location of the street, and before it can be built the public street, or enough of it, must be appropriated by the

f eminent domain, and the constitutional compensation, or secured to be paid, to the abutting lot when he objects to the use; and he may invoke the equity to stop the construction till that is done.

not have marshalled all of the reasons, or stated as they should be, why street railways, including street railways, have been, with one accord, adjudged by the courts not to be *per se* a new servitude on the street.

disposes of one of the complaints of the plaintiff.

are some others.

street railway of any class is so constructed as to substantially impair the incidental rights of an abutter in the street," some of which have been mentioned, it is an unequal burden, and he is entitled to compensation. In illustration, this rule applies when the street has to be used for the sole and exclusive accommodation of the railway company, whereby the abutting lot owner's access is intercepted or impaired. It was just such cases as these to which the Supreme Court, in the 48th Ohio case alluded, when it stated that it would not determine how far a street railway corporation might be required to pay for "damages incidentally caused to another." This proposition is also sustained by the decision in the *Ohio St.* case.

plaintiff attempts to make a case of damage to his property rights in Fourth street. A public market, he says, has been carried on there for over forty years; it is now being carried on. The sellers, gardeners and farmers use a portion of the street on market mornings. A business has been built up there. The construction of a street railway will drive that business away. That will diminish the value of his property at least thirty per cent. This complaint suggests the mention of an historical incident. It is said that when Stephenson, who was making a successful adaptation of steam engines to locomotives, was trying to obtain the consent of the British government to establish a railroad, he encountered a great

deal of conservatism and prejudice. The Tory squires were seized with a panic. They fought his measure, and pictured to Parliament how the game would be frightened to death, the coaching inns superseded, and their breed of horses become extinct — all results of the new mode of travel. Then to clinch the argument, they drew a picture of the catastrophe that would follow if a bull should attempt to butt a locomotive off the track.

The complaint of the plaintiff about the market disappearing to the depreciation of property on Fourth street is all prophecy and speculation; it is not proved by the affidavits that it will happen. Besides, if it did, it would not be a damage to any incidental right in the public street which he possesses. His interest in the continuance of the market at that place is not one of his incidental rights in the street, which can be, in law, impaired by the construction of the street railway.

The complaint that the portion of the street outside of the street railway tracks would be too narrow to permit marketers to use it, and people to pass and repass on it, was met and answered by the affidavits of the defendant.

It also charged, in a general way, too general to be good pleading, that this narrowing of the street will deprive him of the easement of access to his property. It was claimed that vehicles could not stand at right angles with the street between the outside rails and the curbing.

The evidence does not sustain this claim, or that it would even interfere with the exercise of that right; but if it did, the law, as announced by the Pennsylvania Supreme Court, is pertinent. "It is claimed," said the Court, "for the plaintiffs, that their right of free passage to their property along High street is interfered with because vehicles cannot stand between the railway tracks and the curbing without interfering with the cars. But the right of the property owner in this respect is not at all changed. He has the same right, after the tracks are laid and the cars running, that he had before. It is a right which must be exercised in reason, whether there are car tracks on the

not. In no circumstances does it confer the privilege of obstruction by unreasonable exercise. But the reasonable exercise of the right gives no right to the street companies to arrest it. If, at any time, the owner has a right for the presence of vehicles in front of his property on the street, to take away or deliver persons or goods, he may exercise that right for such reasonable time as is necessary for his purposes; and if, in such exercise of the right, the passage of street cars is impeded, the street cars must wait. Such stoppage of cars is a matter of frequent occurrence in all large towns and cities where street cars are laid upon narrow streets." *Rafferty v. Centennial Co.*, 23 Atl. Rep. 885 (Pa. 1892). The respective rights of the abutter and street railway company must be harmoniously exercised. They must be so exer-

...k it is a subject matter of pride and congratulation to the local bench and bar, that a member of the latter, who, both, has written a book which will redound to his credit on the subject being "The Laws of Street Railways." The book is drawn out of the wilderness of reported cases and is a statement of the principles of the law on that subject. The book is written with conscientious care and commendable ability. The arrangement of the topics is logical; the language is very clear and precise, and is neither too concise nor too verbose. A legal treatise being "an orderly statement of the principles in which the law consists, whether drawn from the reports of law cases, from natural reason, or from other source, accompanied by such illustrations and references to authorities as to render them plain in their application, and accurate in outlines, and settle to the popular mind the fact that they are truly the law;" this book belongs to that category. It will undoubtedly promote the science and practice of law.

The reasons given in this opinion, the temporary restraining order heretofore granted is vacated, and the plaintiff's motion for an injunction overruled.

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—See note to *Green v. City & Suburban Ry. Co.*, post.

SEDGWICK DEAN ET AL. V. THE ANN ARBOR STREET RAILWAY COMPANY.*Michigan Supreme Court, Oct. 27, 1892.*

(93 Mich. 330.)

ELECTRIC STREET RAILWAY.—ABUTTING OWNER.

The use of a street for purposes of an electric railway does not impose a new burden for which abutting owners are entitled to compensation. Case of this series cited in opinion: *Detroit City Ry. v. Mills*, vol. 3, p. 333.

APPEAL by complainant from decree of Circuit Court, Washtenaw county, dismissing bill for injunction.

Joseph H. Vance (*Thomas A. Wilson*, of counsel), for complainants.

Thompson, Harriman & Thompson, for defendant.

McGRATH, C. J.: This is a bill filed to enjoin the construction of an electric street railway with overhead wires and poles in Packard street, in the city of Ann Arbor. The street is 66 feet wide and the roadway 34 feet in width.

There is nothing in the record which distinguishes the present case from *Detroit City Railway v. Mills*, 85 Mich. 634, and that case, with *People v. Railway Co.*, 92 id. 522, must be regarded as the settled law of this State.

Complainant Raffensberger alleges special injury to her property, which is a corner lot, by reason of the lengthening of the curve from Main street into Packard, but her remedy is at law.

The decree of the court below, dismissing complainants' bill, is therefore affirmed, with costs for defendant.

The other Justices concurred.

NOTE.—See note to *Green v. City & Suburban Ry. Co.*, *post*.

PERSON RAILWAY COMPANY v. JOSEPH C. GRUNDY
ET AL.

New Jersey Court of Chancery, April 28, 1893.

(51 N. J. Eq. 218.)

STREET RAILWAY.—ABUTTING OWNER.—INJUNCTION.—STATU-
TORY CONSTRUCTION.—NEW JERSEY SUBWAYS ACT.

enance of a single wire by an electric street railway company at
of twenty feet above a sidewalk imposes no new burden upon
of an abutting owner.

constitutes a nuisance, which any citizen may abate, depends
er or not it was maintained without lawful authority.

authority to a street railway company to use "such motive
they may deem expedient and proper" does not confine the
to such methods as were known when the law was enacted,
ides the electric trolley system, though it was then unknown.

ry injunction, at suit of a street railway company, to restrain
ing land owner from cutting its feed wire, refused, it not
g that the company had obtained consent of the State board of
ioners of electrical subways, to maintain overhead wires, as
by statute.

y Subways Act considered.

is series cited in opinion: *Lockhart v. Craig St. Ry. Co.*, vol. 3,
Halsey v. Rapid Transit St. Ry. Co., vol. 3, p. 268; *Roake v.*
ph. & Tel. Co., vol. 3, p. 218; *Hewitt v. W. U. Tel. Co.*, vol. 3,
Hudson River Teleph. Co. v. Waterulet, & Co., post; *Taggart v.*
St. Ry. Co., vol. 3, p. 308; *Mt. Adams, & Co., Ry. Co. v. Winslow*,
262; *Pelton v. East Cleveland R. R. Co.*, vol. 3, p. 215; *Louis-*
gging Mfg. Co. v. Cent. Pass. Ry. Co., vol. 3, p. 286; *Detroit*
v. Mills, vol. 3, p. 333; *Koch v. No. Av. Ry. Co.*, ante p. 153;
s v. City Elec. Ry. Co., vol. 3, p. 281.

ICATION for preliminary injunction. Facts stated
ON.

W. Griggs, for the complainant.

David J. Berry and George S. Hilton, for the defendants.

GREEN, V. C.: The complainant, the Paterson Railway Company, was formed by the consolidation, under the act of 1888, P. L. of 1888, p. 74, of the Paterson City Railway Company, the Paterson & Passaic Railroad Company, and the Haledon Horse Railway Company, three corporations operating street railways in the city of Paterson and its vicinity at the time of such consolidation, on April 28, 1888.

The Paterson City Railway Company was organized under the provisions of the statute, Rev. p. 922, § 76, by the grantees in the deed of the master, under proceedings of foreclosure and sale of the property and franchises of the Paterson & Little Falls Horse & Steam Railroad Company, which were included in a mortgage executed by the said company to secure the payment of bonds issued by it. This last named company was incorporated by act of the Legislature approved April 9, 1866, P. L. of 1866, p. 1068. A supplement to the said charter was passed by the Legislature, and approved March 14, 1870, P. L. of 1870, p. 529. The original charter gave the company authority to operate its cars by such motive power as it might deem expedient and proper. Prior to the foreclosure and sale of its property and franchises, it had built and was operating a surface railroad on various streets in the city of Paterson, including a portion of River street.

The bill alleges that the complainant corporation, being of opinion and having determined that it was expedient and proper to operate its railway system by the application of electricity to electric motors for the propulsion of its cars, instead of horse power, as formerly, adapted two of its routes to that method, and was engaged in preparing to put it in operation on its railway on River street, embracing the section of that street on which defendant Joseph C. Grundy owns several lots.

The allegations of the bill with reference to the adoption

an and the method of its practical application are
ally as follows: The company, in the exercise of
etion confided to it, and in discharge of its duties
a public franchise for the transportation of passen-
ne most commodious and advantageous manner,
ded and does deem that it is necessary for the
of more rapid transit to substitute electricity for
the propelling power of its cars, and that, as a
of fact, there is now but one safe and practical
nown and in operation for supplying the electrical
to the cars, and that is what is known as the trolley
ead system. That the system of electrical motors
the company is that known as the trolley or over-
tem, which consists of iron posts set near the curb
the sidewalk of the street, upon which insulated
lled feed-wires, are stretched at a height of about
bove the street; two other wires, called the trolley-
e stretched above the tracks, and are connected at
by cross wires with the feed wire; a rod or arm
from the car and connects with the overhead trol-
; through said rod the electrical current is trans-
om the overhead wire to the running gear of the

ll further alleges that the company, at the time of
e bill, had nearly completed the erection of the
d stringing the wires along its line, from its ter-
River street, through River street, a distance of
ree-quarters of a mile, in which work it had ex-
a large sum of money, and that the line was nearly
ed and ready for use, to be operated under the trol-
em.

se preparations the employes of the company had
feed-wire along and over the sidewalk, near the
e, in front of lots Nos. 557, 559, 561, and 563 River
owned by the defendant Joseph C. Grundy; the
ng, as alleged, one of the wires necessary for the
n of the trolley system by electricity, adopted by
company, and intended to be used in propelling

cars upon its tracks on River street. This wire was 22 feet above the surface of the sidewalk, and was attached at both ends to poles set in the ground at the edge of the curb on the sidewalk, one upon lands southwest of defendant's lands, and the other upon lands northeast of defendant's lands.

On the 7th day of June, James Grundy and John Grundy, brothers of the said Joseph C. Grundy, and by his direction, cut the wire stretched in front of the lands mentioned. To do this they put a ladder up against a limb of a tree, and James held a sledge hammer against the wire, while John cut it with a chisel or some sharp instrument. The defendants threatening to cut the wire as often as it should be strung across that space, the complainant, the railway company, filed the bill in this cause for an injunction to prevent their so doing.

On the presentation of the bill, an order to show cause why an injunction should not issue, in pursuance of the prayer, restraining the defendants from interfering with said wire, was issued, with a restraining order forbidding the defendants from so doing until the further order of the court. A copy of this order was served upon the defendants by the deputy sheriff of the county of Passaic; but one of the defendants, notwithstanding the mandate of the court, again cut the wire, which had been replaced.

On the hearing of the order to show cause, the violation of the previous order of the court was brought to the attention of the court, by motion to punish the party, of which notice had been given, with copies of affidavits to be presented. This act was committed by one of the defendants, who was not the owner of the property, and the hearing of the order to show cause proceeded against the owner.

No answer was filed by the defendant, but affidavits of Joseph C. Grundy and John Grundy were presented, and the injunction was resisted, on the ground that the complainant had no legal authority in the premises.

The affidavits show that the defendant Joseph C. Grundy objected to the company laying two tracks in River street,

used his consent to their putting up poles upon, or
 g wires across, his sidewalk, unless compensation
 e to him for the damages which would result from
 ; that he notified the company to remove the wires
 y had been strung, and that he would cut them if
 removed ; and that John and James C. Grundy did
 wire, after waiting for the company to take it down.
 m is made by the affidavits that it would be impos-
 raise a ladder up to the buildings in case of fire, or
 rner wished to paint or repair ; that the tracks do
 e sufficient room between the rail and sidewalk for
 nd wagons to safely pass while the electric railway
 n operation ; that the tenants are incommoded, and
 of them have moved on account of alleged danger
 ves of their children ; that the route of the original
 n & Little Falls Horse & Steam Railroad Company
 go on River street ; and that the only motive power
 by horses hitched to the cars, until the last two or
 onths, when the electric trolley system was first

idavits present no justification of the acts of the
 ts, unless it is true that the complainant company
 out lawful authority, placed an obstruction on the
 , which any one may remove, or without such
 y, has invaded some right of the owner of the
 in a way to justify him in forcibly removing the
 ion so placed upon the use of his property.

jection urged by the defendant's counsel was a want
 uthority in the complainant, first, to maintain a two-
 any railway on River street ; and, second, to use
 motors, or erect and maintain on the streets the
 y appliances for the transmission of electricity to

* * * * *

discussion of the first question above stated is
 except the conclusion of it.]

ext claimed that this company has only the right
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to place a single track in any of the streets in the city of Paterson, but it is difficult to perceive how this could give the defendant the right to cut a wire which the company may have strung across the sidewalk in front of his property.

In my opinion, the right of the complainant to operate a street surface railway in River street, in front of Joseph C. Grundy's property, is clear.

Has the complainant corporation the right to apply electricity by what is known as the overhead trolley system, to the propulsion of its cars, and to erect and maintain the appliances necessary for the application of such power?

The question as to the absolute right of Joseph C. Grundy to cut the wires strung over his sidewalk by the complainant presents itself in a twofold aspect, viz., his right as the owner of abutting property, and his right as a citizen.

The complainant in this case has not placed upon the land in front of defendant's property any obstruction at all; his sidewalk is unincumbered; the posts are erected upon the lands of the owners of property on either side of his lot, and the only obstruction is the stringing of a wire twenty odd feet above the curb line in front of his lands between the poles.

In considering the right of defendant as an abutting owner to remove the wire, we assume for the present that the complainant has legislative sanction for the operation of its railway by the use of electrical force and its appliances; for, if it has not, the defendant's right to clear the air of obstructions is as unquestionable as his right to clear the surface of the street in front of his property. If the contemplated use of the street by the complainant is authorized by statute, the defendant's rights therein are subservient thereto, unless such use imposes an additional servitude upon the land taken by the street fronting defendant's property, or on his land abutting thereon.

The special rights of the abutting owner in the streets are *quasi* easements of access and light and air over the land of the street, fronting his property. *Barnet v. John-*

McCart. 481; *Dill v. Board of Education*, 2 Dick. 441. These he cannot be deprived of without compensation being made to him. *In re New York E. R. R. Co.*, 70 N. Y. 327; *In re Gilbert Elevated R. Co.*, 70 N. Y. 361; *Story v. New York Elevated R. Co.*, 90 N. Y. 122; *Lahr v. Metropolitan Elevated R. Co.*, 104 N. Y. 268; *Drucker v. Manhattan Elevated R. Co.*, 106 N. Y. 157; *A. B. N. Co. v. N. Y. E. R. R. Co.*, 108 N. Y. 252.

are interests distinct from those possessed by the public, and are rights appurtenant to the lot and improvements thereon. *Decker v. Evansville S. & N. W. R. Co.* (Ind.) 33 N. E. Rep. 349.

Equally well settled that when a public use, authorized by law, takes no property of the individual, but affects him by proximity, the necessary interference with his business or in the enjoyment of his property, caused by such use, furnishes no basis for damages. *People v. Mayor*, 4 N. Y. 195; *Bellinger v. Railroad Co.*, 1 N. Y. 42; *Moyer v. Railroad Co.*, 88 N. Y. 351; *People v. Railroad Co.*, 101 N. Y. 98; *A. B. N. Co. v. N. Y. E. R. R. Co.*, *supra*. The defendant's right to compensation, springs, therefore, from his rights of adjacency, and not from the fact of proximity. It must be an interference with one of the rights of access or of light or air, and so far as the adjacent owner is concerned, hampers his exercise of legislative control of the street for public use as a highway. The stringing of a single wire across and over the defendant's lots, 22 feet above the curb cannot seriously be said to be any substantial interference with his *quasi* easement of light and air. Of course, the defendant's rights of adjacency over the surface of the street are not impaired by the acts of the complainant. But the defendant owner has not only the right of ingress and egress in the accustomed manner, but also to have the way of access to the upper stories of his house kept free from obstructions which will prevent its use in emergent cases, such as fire, or which cannot be quickly displaced in such

an emergency without serious danger to the person attempting their removal. The pleadings and affidavits before me on this order to show cause do not fairly present the question of fact whether the "feed wire" strung over defendant's curb line might not have been placed over the middle of the street without impairing its efficiency, nor what is the real danger, if any, in having it where it is now suspended. There can be no question that a privilege granted to a corporation of a partial use of the public highway, which threatens, if it does not encroach on, the property rights of the adjacent owner, should be so exercised by the company as to minimize the inconvenience and danger to the enjoyment of such rights. If it is not simply a question of expense, and the stringing of such are accessory to the electric railway, as a feed-wire over the middle of the street, instead of over the sidewalk, does not destroy or seriously impair its usefulness, and if the strength of the electric current through it is so great that there is danger in handling such a wire in case of necessity to quickly remove it, the company should be required to string it in the way attended with the least interference and danger to adjacent property; or, if that is impracticable, then to adopt mechanical appliances of safety as "cut-outs," as were required by the chancellor in the case of *The Jersey City and Bergen Ry. Co. v. Jersey City*, 1891, not reported.*

The bill in this case practically alleges that the appliances used by the company are those which are best adapted to the purpose, and the affidavits of the defendant only set up that the wire in question will interfere with the putting up of ladders in case of fire, or his desire to paint his house. There is also an apprehension of danger expressed. But it is only the opinion of the defendant. Whether he is qualified to pronounce a reliable opinion on the question or not does not appear, and the facts in this case do demonstrate that this wire can be

* See 3 Am. Elec. Cas. 94, note.

usly and safely removed. We must, therefore, consider the question of this wire without regard to the danger, and consider it simply as a wire strung over a sidewalk.

Belmont v. Craig Street Ry. Co., 139 Pa. St. 419, says: "The placing of the wires over the streets appear to be a taking of plaintiff's property. The streets are dedicated to the public use, and he has certain rights as an abutting owner, but I cannot see how the placing of wires through the air above the streets can be said to be a taking, injury, or a destroying of his property." The distinction between the use of a street by telephone and street railways is, that the latter is a public use, and the former is not, consistent with the character of a highway, is clear, and is recognized in *Halsey v. Essex Transit Co.*, 2 Dick. Ch. Rep. 380; yet Chancellor Kent, in *Roake v. American Telephone and Telegraph Co.*, 14 Stew. Eq. 35, denied complainant a preliminary injunction to restrain the telegraph company from strung wires over the street in front of his lands, on the ground that his right was not clear, as well as that the injury, if any, was not irreparable, but expressly disclaimed the question to pass on the main question. He, however, said: "The Legislature of this State appears to have held that the use of the street, so far as the wires are concerned, was not a violation of the rights of the owner of the land on the streets; for, while it recognizes such rights in the erection of poles, it does not do so as to the wires." See also *Western Union Telegraph Co.*, 4 Mackey, and *McCormick v. District of Columbia*, 4 Mackey, where both applications for injunctions to restrain the laying of a telegraph line along a street in Washington were refused, because no irreparable injury was shown, and that it could not be seriously contended that the use of the street, or the light or air were interfered with, and the inconvenience and nuisance from the wires were very slight. Of neither of these cases is exactly in point, but they are sufficient to show how shadowy is the right on which

the defendant relies. In my opinion, the act of the complainant in stringing its wires in front of the defendant's lots, if authorized by statute, was not such an invasion of defendant's rights of adjacency as to entitle him to compensation, and consequently he was not justified in removing it by reason of the fact that he was such abutting owner.

His right as a citizen, in common with all others, depends on the question whether the occupation of a part of the street by the complainant was without lawful authority, and, as such, a nuisance which any one could abate.

Complainant claims the right to use the overhead trolley system in the application of electricity to its cars as a motive power from the original charter of 1866, and the supplement of 1870, as well as by the act of 1886, and the consent of the city authorities of Paterson.

By section 16 of the original charter of 1866, it is provided:

That the said company shall have power to construct or have constructed, or to purchase with the funds of said company, and place and use on said railway, or any part thereof, cars, engines, wagons, carriages, or vehicles for their own use, or for the transportation of passengers or any species of property, for hire, to be operated by such motive power as they may deem expedient and proper.

And by section 2 of the supplement of 1870 it is provided

That, in the construction, equipment, management, running, and operation of said railroad, the said company shall have and possess all the powers, authority, and privileges granted to and conferred upon them by the act to which this is a supplement.

The right of the Legislature over the public highways, and to grant the use thereof for the public convenience and travel, so long as it does not impose additional servitudes upon the property, and does not materially obstruct the public use by ordinary and accustomed methods, is undoubted. *Domestic Telephone and Telegraph Co. v. Newark*, 20 Vr. 344-346. Its power to authorize the erection of lamp posts,

ggs, and fire telegraph poles on the public high-
never been questioned; they are for the public
e, and their occupation of the surface of the
and consequent inconvenience, is infinitesimal.

case the grant is not the right to use steam *or*
the operation of their cars, but *any* motive power
deem expedient and proper; it has but one limit,
is the discretion and judgment of the company,
ulated, of course, by the controlling rule that the
adopted shall not obstruct the public use in its
ed way. Nor do I think this power is limited to
ods known or in practical use at the time of the
Practically these were confined to animal and
wer. If the grant had been to use a specific power,
use, in a particular way—if they deemed it expe-
proper—there might be strength in the argument
did not authorize such method in another way,
quired other and additional use of property; but
grant of authority is as ample as words can make
ould seem to embrace, not only known systems or
propulsion, but all improvements which science
uity might devise, subject to the conditions before

*Alson River Telephone Co. v. Watervliet Turn-
Ry. Co.*, 135 N. Y. 393, in the New York Court of
a similar question arose. The defendant company,
1862, were authorized to use "the power of horses,
or any mechanical or other power, or the com-
of them, which the said company may choose to em-
cept the force of steam." On its right to use the
stem in the application of electricity for the traction
the court says: "The act of 1862 cannot properly
l to such methods of operating street surface rail-
ities as had then been invented and were then in
a. The words of the statute are to be interpreted
to their natural and obvious meaning, and, as
employed are not ambiguous, extrinsic facts are
able to restrict the authority which it plainly

confers. The language, literally construed, includes undiscovered, as well as existing, modes of operation. Electricity, as a natural and applied force, was then well known, and it is reasonable to infer that its adoption as a propelling power was even then anticipated. It would be an unjust reflection upon the wisdom and intelligence of the law-making body to assume that they intended to confine the scope of their legislation to the present, and to exclude all consideration for the developments of the future. If any presumption is to be indulged in, it is that general legislative enactments are mindful of the growth and increasing needs of society, and they should be construed to encourage, rather than to embarrass, the inventive and progressive tendency of the people." See also *Taggart v. Newport Street Ry. Co.*, 16 R. I. 668; *Williams v. Street Ry. Co.*, 41 Fed. Rep. 556; *Macomber v. Nichols*, 34 Mich. 212. *Detroit City Ry. Co. v. Mills*, 85 Mich. 634.

The bill also avers that by an ordinance passed by the board of aldermen of the city of Paterson on the 6th day of October, 1890, approved by the mayor on the 10th of October, 1890, the complainant was authorized to use electric motors as the propelling power of their cars, an averment which is verified by the affidavits annexed to the bill, and is neither controverted nor denied by the papers presented by the defendant. The authority to pass this ordinance is claimed to be derived from the act of March 6th, 1886, entitled "Concerning street railway corporations," Rev. Sup., p. 369. The right of a street surface railroad company under this act, and such consent to use electric power, and maintain the proper accessories thereto, for the propulsion of its cars, is, so far as this court is concerned, settled by the case of *Halsey v. Rapid Transit Street Ry. Co.*, 2 Dick. Ch. Rep. 380; and by that decision the right of the complainant to erect its appliances for the application of this power for the movement of its cars would seem to be clear under the rights which have been granted to it by the Legislature and the authority of the city of

The views of the vice-chancellor in that case are sustained by the decision in Rhode Island, of *Taggart v. Port Street Ry. Co.*, *supra*; in Ohio, in *Mt. Adams v. I. Ry. Co. v. Winslow*, 3 Ohio Cir. Ct. Rep. 100; in *Pelton v. East Cleveland R. R. Co.*, 22 W. L. R. 100; in Kentucky, *Louisville B. M. Co. v. City Passenger Co.*, decided June 30th, 1890; in Michigan, in *City Ry. Co. v. Mills*, 85 Mich. 634; in Pennsylvania, *Lockhart v. Craig Street Ry. Co.*, 139 Pa. St. 100; in Maryland, in *Koch v. Railway Co.*, 75 Md. 222; in the United States Circuit Court, in *Williams v. Street Ry. Co.*, 41 Fed. Rep. 556.

Also, consideration of the question and cases in Keasb. v. Sires, S. & H., ch. X.

The legislature, by the fifth section of an act creating a board of commissioners of electrical subways, approved March 1, 1892 (P. L. of 1892, p. 78); enacted:

telegraph, telephone, electric light, or other electric wire or hereafter be constructed along, across, or above the surface of any street or avenue in any city of this State until the board created by this act, by the votes of a majority of its members, authorize such wire to be carried along, across, or above the surface of such streets or avenues. *Provided*, that this section shall not be constructed [sic] to apply to any wire of wires now in use, or to wires owned by any [sic] of this State used for fire or police purposes therein.

The statute was approved prior to the attempt on the part of the complainant to string its wires above the street level of the defendant's property. There is no averment in the bill that the consent of the subway commission had been obtained by the complainant, nor is want of such consent set up in the answer. The statute, however, is a public statute operating over the whole State, affecting every city therein. No private corporation can possibly enjoy the right to use the public highways without legislative sanction; and if the Legislature has imposed conditions on all claiming such legislative authority, it affects the interests of the public, it would be the

duty of the court to apply the test imposed by the latest legislation, whether the parties pleaded it or not. The point that the question is not raised by the pleadings was, however, not strenuously urged, as counsel frankly stated it was a matter easily reached by amendment, if necessary.

This section, unaffected by the proviso, unquestionably imposed a new condition on all parties intending to string electric wires above the surface of any street or avenue in any city in the State. No question was, or can be, made as to the power of the Legislature to impose new limitations, on any previous concession of authority to the complainant, to partially use the highways of the State. It is claimed, however, that the rights of the complainant are not affected by the section in question, because it is unconstitutional, as not being within the scope and provision of the title of the act. The title is "An act providing for the placing of electrical conductors under ground in cities of this State, and for the creation of a board of commissioners of electrical subways." It is urged that the object of the law, as gathered from the title, is to provide for the placing of wires *under* ground, and for the creation of a board to do that specified thing; that it might have been competent to have enlarged the scope of the title to regulate the placing of wires generally, but that it had not done so, and limited it to subway wires and a subway commission. But the single general object of the law, as gathered from its title and provisions, undoubtedly, is to require electric wires occupying the streets or avenues of a city, sooner or later, to be placed underground. The commission is the means by or through which this object is to be accomplished, and that no hardship be occasioned by an abrupt termination of all right or license to string wires in cities, the commission is authorized to permit it being done. While not clearly so, this seems to me to be germane to the object of the law as stated in the title, and fairly within the rule laid down in the authorities which are cited by the chancellor in *Stockton v. Central R. R. Co.*, 5 Dick. Ch. Rep. 52.

It is also claimed that the section itself does not by its

der it necessary for the complainants to obtain the
of the commissioners. There are two obvious errors
viso of section 5, as it appears in the pamphlet
ch, it is said, also exist in the original on file in
tary of State's office. The word "constructed"
ntly been substituted or used for the word "con-
and there is a palpable omission after the word
No great difficulty arises from the first, but the
doubtedly raises some very plausible suggestions.
st argued that in construing this section it is not
to inquire whether the Legislature intended to
word after the word "any," nor to interpolate
l, even if it is evident what it should be. To the
position I yield an unhesitating assent. You can
tside the law to ascertain the intent of the Legis-
or can you supply words to make it conform to
understand the meaning of the Legislature to be.
nk it is competent, when a construction is sought
ced upon the words of the act, to ascertain whether
apparent from the context that there has been
d omitted, which fact itself will negative the con-
sought to be given—not by supplying a word to
e other construction, but deducing from the fact of
that the proposed construction is not correct. This
violence to the rule that the legislative intent must
ed from the act itself. Counsel argues that "any"
sed as a pronoun, and, when used in this sense,
ost comprehensive signification; that, construed
t to which it applies—which, it is argued, is that
mediately precedes, namely, "wires owned,"—it
held to mean any one capable of ownership, indi-
r corporate; and numerous examples of such com-
ve use of the word by itself are cited. It is, how-
be noted that such extended sense of the word is in
es derived from the context, and that the sentence
raph is complete as it stands. On reading this pro-
ver, the first impression is that some word has
itted—its incompleteness is at once manifest—but,

if the construction contended for is correct, the only word which would comprehend it would be "one," making it read "any one." Such construction, however, would render nugatory the whole section, and cannot be adopted. It is apparent, I think, that the omitted word is "city," but I agree with counsel that we cannot by judicial construction interpolate it. The difficulty, however, arises with only one division of the proviso; two others are complete and operative; the proviso enacts that the section shall not apply to the repair of wires now in use. There is no obscurity so far. It is not necessary to obtain the consent of the subway commission to string wires in a city, if it is done in repairing wires now in use; nor is it for wires used for fire or police purposes therein; "therein," from the context, must relate to "State," there is also the sentence under consideration "or to wires owned by any of this State." It seems to me impossible to give any satisfactory meaning to these words taken in connection with the context. But is the whole section on that account to be disregarded? I think not. The provision of the section requiring the consent of the commission is perfectly clear. There is no doubt, from the proviso, that it is not to apply to the repair of wires now in use, or to wires used for fire or police purposes. Thus far the meaning of the Legislature is distinct. It appears they meant to except some other wires, but, for want of apt words, they have failed to indicate what. It cannot be presumed that it was a class which would embrace the complainant; but, as we cannot from the words give it a satisfactory application, it is to be disregarded. The rest of the section is not affected by such course.

But if it is even doubtful whether the act is or is not constitutional, or whether it applies to the complainant, it is fatal to this application, for this court will not grant a preliminary injunction on a questionable point of the constitutionality of a statute, or its applicability to a party. *Inhabitants of Greenville v. Seymour*, 7 C. E. Gr. 458; *Bonaparte v. Camden and Amboy R. R. Co.*, Bald.

Block v. Rapid Transit Co.

*Wickensack Improvement Co. v. New Jersey Mid-
Co.*, 7 C. E. Gr. 94; *Morris and Essex R. R.
v. Rudden*, 5 C. E. Gr. 530; *Black v. Camden and
R. R. Co.*, 7 C. E. Gr. 130, 131.

der to show cause must be discharged.

see note to *Green v. City & Suburban Ry. Co.*, *post.*; also, note
Presby. Church v. State Board, *post.*

LOOK V. SALT LAKE CITY RAPID TRANSIT COM-
PANY.

Utah Supreme Court, June 5, 1893.

(8 Am. R. R. & Corp. Rep. 337.)

ELECTRIC STREET RAILWAY.—ABUTTING OWNER.

the fee of the land of the highway be in the municipality in trust
for purposes of public travel, or in the abutting owner subject to the
use of the abuttor, the abuttor has the easements of access, light and air, of
which he cannot be deprived without compensation.

The use of highways for the purposes of electric street railways is a proper
use which may be permitted by municipalities under legislative
authority. Such permission must be, however, within the exercise of
discretion, and the entire width of a street cannot be given
over to highway purposes in disregard of the abuttor's easements, which
are property rights. Certain statutes held not to be construed to the

In the case, it appearing that there were already in the street in
use two tracks, with the necessary poles and appliances for the
operation of sufficient electric cars for the public convenience; also that
there were electric light, telegraph and telephone poles on both sides of
the street, it was held, that an injunction was properly granted restraining the
city from laying a third track with the necessary poles, which would specially
interfere with the plaintiff's right of access and depreciate the value of his
land, although such construction had been authorized by the city

The series cited in opinion: *Ogden City Ry. Co. v. Ogden City*,
131.

Parley L. Williams, for appellant.

Bennett, Marshall and Bradley, for respondents.

BARTON, J.—The respondents are the owners of certain lots situate in Salt Lake City, and abutting on Second South street, between Main and Second West streets. Two of these lots are on the north, the other on the south, side of Second South street, are one block west of Main street, are business property, and at the time of the trial of the cause business blocks were being erected thereon. The complaint, in substance, charges that the plaintiffs were respectively the owners of that portion of the street which lies between the centre line thereof and the front line of the said lots, subject only to the ordinary use of the public for the purposes of travel; that the plaintiffs are entitled to the free and unobstructed use of the street as a means of access to the said premises; that by authority of Salt Lake City the Salt Lake City Railroad Company constructed on that street a double-track railroad, with wires, poles, and other appurtenances necessary to operate the same with electric power; that the same was being so operated, and afforded all necessary means and convenience to persons who might have occasion to travel on street railroads; that telegraph and telephone lines, and wires and poles for electric light, had been constructed on the street; and that by reason of the several uses with which it had thus been burdened the ordinary use thereof for public travel and ingress and egress to the several premises had become impeded and embarrassed; that on the sixth day of May, 1890, and after the said street had been burdened as aforesaid, Salt Lake City, by its council, granted the defendant herein authority to construct and operate by electric power, a street railroad on said street from First East to Seventh West street; that because of the obstructions already existing thereon, and because another railroad was not necessary for public convenience, the resolution granting the franchise to the defendant was unreasonable

that in pursuance of the authority thus granted, defendant commenced the construction of a railroad, intended to complete the same unless restrained, and her railroad constructed thereon with its equipment and operation, in addition to the already burdened use of the street, would greatly depreciate the value of plaintiff's property, and injure its convenient use and enjoyment. The defendant in its cross complaint in answer alleges that it owns and operates various lines of street cars and roads in the city and remote parts thereof, and in densely populated localities in the eastern portion of the city for public convenience it should have a line running through the business portion of the city, to connect with the depots and other parts of the city lying west of the street; that defendant had no franchise connecting its lines with the western portion of the city and the business part thereof, except the one on Second Street; and that in the granting of franchises the court denied the right to parallel existing lines except in case of necessity. The trial court, in substance, found the above allegations of the plaintiffs and defendants to be true, and, upon other things, found as facts that the plaintiffs are owners of equitable easements in fee of rights of access, and egress to their respective lots in front thereof on the west side of said street, and entitled to the free and unobstructed use of a portion of said street as a means of access, such as a sidewalk extending along the street from the first north side of the street east of said lots to the first north side of the street west of such lots, the same being subject to the free use of the street by the public; that the fee of the street is in Salt Lake City, in trust for street uses; that prior to the granting of said franchise by the court there were constructed and in operation on that street a street car track street railroad, telegraph and telephone lines and poles for electric lighting and the street had already become greatly obstructed and access to plaintiff's property impeded and embarrassed; that because of the obstructions already existing upon the street, the resolution

attempting to grant the franchise to the defendant was unreasonable and void ; that the two tracks in operation in said street were sufficient to satisfy the demands of public convenience, and there was no necessity for a third track ; that its construction would greatly depreciate the value of plaintiff's property, interfere with its convenient use and enjoyment, and they would thereby suffer irreparable damage ; that Salt Lake City, in granting the franchise to defendant, did not act within its lawful authority, nor exercise reasonable discretion for the best interests or convenience of the public ; that the two tracks were constructed and are being operated in front of said lots by the Salt Lake City Railroad Company, and are sufficient to permit the passage of all street cars necessary for public convenience, and between the third track, proposed to be constructed, and the sidewalk there would not remain sufficient space for the ordinary traffic of the street, free from unreasonable obstructions ; that the defendant has electric street car lines in operation in the eastern and western portions of said city, but has no other connecting line or franchise except the one on said Second South street passing through the business portion of the city, or reaching the depots of the several steam railroads, such connecting line being of great importance to the defendant, and necessary for the public travel ; that the defendant company and the Salt Lake City Railroad Company can operate both their railways together by means of the two tracks of the last mentioned company now on that street, which tracks afford sufficient track privileges for all the cars operated, or necessary to be operated, by both companies for public travel and convenience ; and that the construction and maintenance of a third track would be an unnecessary obstruction and interference with the ordinary use of the street, and the means of access to plaintiff's premises would be unreasonably and materially abridged and injured. Upon this state of facts, the trial court granted an injunction perpetually restraining the defendant from constructing and operating a third track on said Second South street. The defendant moved the

a new trial upon the following grounds: First. "Sufficiency of the evidence to justify the findings of the court in said case, and that the same were erroneous." Second. "Errors in law occurring at the trial excepted to by the defendant." From the order granting this motion the defendant appealed to this

appeals to the inquiry as to whether or not the construction and operation of the third track upon that street by the defendant involves the taking of property of the plaintiffs and as to whether the city council of Salt Lake City exceeded its limits of discretion and authority in granting the franchise to defendant. The plaintiffs contend that they are the owners in fee of the lots above mentioned abutting on Second South street, and, as such abutters, they are entitled to so much of the bed of the street as lies immediately in front of the lots and to the use of the street, on which the proposed third track is to be laid, subject only to the ordinary use of the same for the purposes of public travel, and that they are entitled to the use of the said street, free from unreasonable obstructions, means of access, light and air to their premises. Defendant maintains that the fee of said street is vested in the Corporation of Salt Lake City, and that plaintiffs have no property therein, but are only entitled to the use of the street in common with the people of the city. The plaintiffs do not admit that the fee is in the city, in trust, for the use of the street for proper, and subject to the equitable use of the street in fee of abutters. The lots and street in question are a part of a larger tract entered under section 16 of the Act (St. U. S.), which provided that the corporate lands might enter any portion of the public lands upon and occupied as a town site "in trust for the several use and benefit of the occupants thereof according to their respective interests." Plaintiff's lots are represented on the original plat of Salt Lake City as fronting Second South street, which was

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platted in said plat, and when they were purchased under the forms prescribed by the town-site act the grantees secured the right and privilege to have the street forever kept open. When land is settled upon and occupied as a town site, and lots are sold, the right of way over the streets in front of such lots is an appurtenance of necessity and it requires no special grant in the deed. *Ashby v. Hall*, 119 U. S. 526 (7 Sup. Ct. Rep. 308); *Salisbury v. Andrews*, 128 Mass. 336. The rights of access, light, and air constitute the principal values of such property, and it must be presumed that when lots are sold the grantees purchase them with a view to the advantages which attach to them because of these easements. The right of the grantee to their use is precisely the same as his right to the property itself. Such privileges are easements in fee — incorporeal hereditaments — and form a part of the estate in the lots. They attach at the time the land is platted and the lots are sold, and will remain a perpetual incumbrance upon the land burdened with them. It follows that, when land is platted by the owner of the soil, and lots sold, bounded by a street designated and marked on the plat, the grantee acquires a right to the street in front of the premises as a means of access. 1 Hare Const. Law, 376; Lewis, Em. Dom., § 114; *Story v. Railway Co.*, 90 N. Y. 122; *Wyman v. Mayor, etc.*, 11 Wend. 487; *Child v. Chappell*, 9 N. Y. 246; *Schulte v. Transportation Co.*, 50 Cal. 592; *City of Denver v. Bayer*, 7 Colo. 113 (2 Pac. Rep. 6). Nor does it matter, in this case, that the fee is in the city in trust for the use of the public, instead of in the abutting owners for street uses. Equally in both cases the abutting owners are entitled to the use of the street as a means of access to their lots, and for light and air. If the fee is in the city, the rights of the abutter are in the nature of equitable easements in fee; if in the abutter, they are in their nature legal. In either case the abutters have the right to have the street kept open and not obstructed so as to interfere with their easements, and materially diminish the value of their property. When the lots of plaintiff were

Under the town site act, above mentioned, it was, indeed with the grantees that they were entitled to the street as a means of ingress, egress, light and the rights were inducements to purchasers, became the purchase, are appurtenances to the land, which are so embarrassed or abridged as to materially interfere with its proper use and enjoyment, and they are, property of which the owners cannot be deprived without compensation. By implication, at least, the owners also assumed additional burdens, for they must expend of their own funds for the expense of sewer, gas, water connections, and as well toward the cost of side-walks, paving, and sprinkling in front of their lots. These additional burdens which devolve upon them as abutting property, and, in addition to the relation of their lots to the street, give them especial interest in the street in front of their premises, distinct from that of the public at large. Under such burdens, they may of right make any and all uses of the street, subject to proper and reasonable municipal control and police regulations. *Lewis Em. & Co. v. Dill. Mun. Corp.* (4th ed.), §§ 556a, 556 b; *Block v. Railway Co.*, 18 Or. 237 (22 Pac. Rep. 899); *Thomas*, 7 Ind. 38; *Story v. Railway Co.*, *supra*. The power of municipalities to grant franchises to private persons for the construction and operation of street railways, when empowered by the Legislature so to do, is not, it seems, an open question, although streets were originally not designed for that purpose, but were mostly devoted to the right of public travel in the ordinary modes. Sound public policy, advanced civilization, and a desire to subserve public interest, have induced courts to become more lax in the enforcement of strict technical rules and principles in this regard, and it appears now to be well settled by judicial authority that a reasonable portion of a street may be devoted for the purposes of a street railway, and such is a proper use of the street.

It is for appellant contended that, subject to special legislative restrictions, the Legislature has plenary

power over all public ways and streets. If this position be tenable, then, in the absence of special constitutional restrictions, the Legislature may authorize municipalities to devote the entire width of a street to railroad uses, regardless of the property rights of abutting owners, without compensation for injury to their property. This theory does not appear to be sustained by the authorities. The Legislature may delegate power over streets to municipalities, but in doing so it must recognize the property rights of private individuals. Judge DILLON, in his work on Municipal Corporations (volume 2, § 656a), speaking of the nature of streets and legislative control, says: "Public streets, squares, and commons, unless there be some special restrictions when the same are dedicated or acquired, are for the public use, and the use is none the less for the public at large, as distinguished from the municipality, because they are situate within the limits of the latter, and because the Legislature may have given the supervision, control, and regulation of them to the local authorities. The Legislature of the State represents the public at large, and has, in the absence of special constitutional restraint, and subject (according to the weight of more recent judicial opinion) to the property rights and easements of abutting owners, full and paramount authority over all public ways and public places." It will be observed that the learned author distinctly recognizes "the property rights and easements of abutting owners," and, subject to these, the Legislature "has full and paramount authority over all public ways and public places." Up to within a comparatively recent date, the current of judicial opinion drew a distinction between cases where the fee was in the abutting owner, subject to street use proper, and those where the fee was in the municipality in trust for the use of the public. In the latter class of cases it was uniformly held that the power of the Legislature to authorize the construction of a railroad on the street of a city was paramount, and that it could delegate such power to the local authorities. Of the exercise of this power the abutting owner could not com-

had no right to compensation for injury to his property caused by the appropriation of the street to such use.

In the former class of cases he was entitled to compensation for the injury sustained by such appropriation. In the case of *Railroad Co. v. Hartley*, 67 Ill. 439, this view was taken. Mr. Justice Scott, in deciding the case, said: "A distinction has been taken where the municipality, in granting the right to lay the track owns the fee in the street, and where the fee remains in the abutting owner. And it seems to us that it rests on sound principle, supported by the highest authority." That case was decided in January, 1873, and such, it must be conceded, is the weight of authority at that time. Then the cases came upon the question whether the fee was in the public or the abutter, in many of them without close inquiry as to the exact limitation of the fee; and it was almost universally held that, if the fee was in the abutter, the Legislature could authorize a private corporation to construct a track upon a public street without compensation to the abutter, and likewise it was almost universally held that, if the fee was in the public, the Legislature could authorize the street to be used for such purpose without compensation to him. Since then the whole subject has been under deliberate reconsideration, and the weight of judicial decision seems to abrogate the distinction, and to treat the easements of abutting owners as property forming part of the estate in the property, except in cases where the public owns the absolute fee of the street, the fee is not limited to street uses proper. In such cases the tendency is still to hold that the Legislature, in the absence of special constitutional restraint, may authorize a private company to use the street of a city for its roadbed, without compensation to the abutter. It might be observed, however, that even in this class of cases there seems to be no satisfactory reason why such use of a street, especially beneficial to the grantee of the franchise, should be considered a special injury to the abutter, should be within the exclusive control of the Legislature, without regard to the

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property rights of the abutting owner. Speaking of the nature of public streets, and of the rights of the abutter and of the public, Judge DILLON (in section 656a, Mun. Corp.), observes: "The full conception of the true nature of a public street in a city, as respects the rights of the public on the one hand, and the rights of the adjoining owner on the other, has been slowly evolved from experience. It has been only at a recent period in our legal history that these two distinct rights have, separately, and in their relations to each other, come to be understood and defined with precision. The injustice to the abutting owner arising from the exercise of unrestrained legislative power over streets in cities was such that the abutter necessarily sought legal redress, and the discussion hence ensuing led to a more careful ascertainment of the nature of streets, and of the rights of the adjoining owner in respect thereof. It was seen that he had, in common with the rest of the public, a right of passage. But it was also further seen that he had rights not shared by the public at large, special and peculiar to himself, and which arose out of the very relations of his lot to the street in front of it; and that these rights, whether the bare fee of the street was in the lot owner or in the city, were rights of property, and, as such, ought to be, and were, sacred from legislative invasion as his right to the lot itself." In support of this view of the question he cites, among numerous other cases, *Story v. Railway Co.*, *supra*, which is the leading recent case in New York on this subject. In this case Judge DANFORTH, after an elaborate and exhaustive review of the authorities, concludes: "In whatever way, therefore, we view the plaintiff's case, the result is the same, a right of property in the street with which, until properly appropriated and compensation made, the defendant cannot intermeddle." 2 Dill. Mun. Corp., § 704; *Lahr v. Railway Co.*, 104 N. Y. 268 (10 N. E. Rep. 528); *Railway Co. v. Brown* (Fla.), 1 South. Rep. 512; *Mahady v. Railroad Co.*, 91 N. Y. 148; *Railroad Co. v. Reinhackle*, 15 Neb. 279 (18 N. W. Rep. 69); *Railway Co. v. Cumminsville*, 14 Ohio St.

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York El. Ry. Co. v. Fifth Nat. Bank, 135 U. S. 102 (sup. Ct. Rep. 743); *Railroad v. Schurmeir*, 7 Wall. 274; *Seobald v. Railway Co.*, 66 Miss. (6 South. Rep. 102).

In this case the learned court found that the fee of the south street is in Salt Lake City, in trust for street purposes; and of this appellant does not complain. It is, under the law as applied to this class of cases, the property of the city, and the city has property rights in the street in front of their lots. The street is not subject to the absolute control of the city council, nor can the Legislature confer such control on the city council. While the Legislature can authorize municipal authorities to permit private corporations to construct and operate street railway lines upon the street, the authority thus conferred must be exercised within the limits of reasonable discretion, and not so as to injure the property of abutters. And this leads to a consideration of the power exercised in this case. Did the city council, in granting the franchise, act within the limits of its authority, and with a reasonable exercise of discretion? Section 340, 1 Comp. Laws, Utah, 1888, authorizes Salt Lake City as follows: "To exclusively control, regulate, repair, amend, and clear the streets," etc., "to open, widen, straighten, or vacate streets," etc., "to prevent the incumbering of the streets in any manner, and to protect the same from any encroachment and injury." If the city council exclusively control the streets" were taken alone and construed literally, it might confer plenary power, and, if this were not subject to judicial control, the property owners could have no redress, though the injury to their property, caused by acts of the city council, might be great, but it is also provided to "prevent incumbering the streets in any manner, and to protect the same from any encroachment and injury;" and this is just what the appellants ask for in this case. It is apparent from the opinion that the Legislature intended to confer no authority that would injuriously affect the property rights of the property owners. Subdivision 5, § 389, *id.*, referring to

the powers of Salt Lake City, provides: "To direct and control the location of railroad tracks and depot grounds within the city, and regulate or prohibit the use of locomotive engines thereon, and may require the cars to be used within the inhabited portions thereof to be drawn or propelled by other power than that of steam." This is the statute law of this territory, relied on by counsel for appellant, as applicable to this case. Construed in the light of reason and justice, these enactments do not authorize the city council to grant a railroad franchise if the construction of the road will injure and materially depreciate the value of the property of abutters. When the railroad company has obtained, under the law of eminent domain or otherwise, in cases where the streets are already burdened to the extent that natural justice will allow a right of way, then the council has the power "to direct and control" the location of the tracks.

According to the evidence, as appears from the record in this case, Second South street is one of the principal business streets running east and west, and at the date of the granting of the franchise to the defendant and of the trial of the cause there were in operation upon that street two railroad tracks, which were located in the centre of the street, with a line of poles between them. There were also many electric light, telegraph, and telephone poles placed in line on each side of the street about four feet from the sidewalk, and on these poles were stretched numerous electric wires. The two tracks in operation were constructed with T rails, which project several inches above the surface of the street, and render the crossing of the tracks with a vehicle difficult and dangerous, the street not being paved. The appellant proposed to construct its tracks in a similar way on the north side of the present tracks, and to erect additional poles, which would still further obstruct the ordinary travel, and render the respondents' property less accessible for business purposes. The tracks already upon said street afford ample facilities to run all the cars necessary for public convenience; and the construction of the third

ould be a serious impediment to the ordinary mode
as it would not leave sufficient space between the
rails and the gutter for vehicles to pass each other
ety. Where the track privileges of one company
y street are sufficient for the business of two or
companies, they should all be required to use them
non. The construction of an additional track,
e circumstances of this case, would be an unneces-
struction to and interfere with the ordinary use
reet, and a special injury to the property rights of
ters, and on proper application a court of chancery
ant injunctive relief. In such a case an abutting
eed not stand by and see his property injured with-
having any means of redress. *Dill. Mun. Corp., §*
ine v. Railroad Co., 101 N. Y. 98 (4 N. E. Rep.
den City Ry. Co. v. Ogden City, 7 Utah, 207 (26
p. 288) Pond v. Railway Co., 112 N. Y. 186 (19
ep. 487) Story v. Railway Co., supra.

el for appellant insist that the several findings of
the effect that the construction of the third track
e an unreasonable obstruction of the street, and
granting of the franchise for that purpose by the
ncil was unlawful, and an unreasonable exercise of
n, are not justified by the evidence. There appears
ne conflict in the evidence on this point, but, the
udge having heard the evidence, and having had
rtunity to observe the manner and bearing of the
s while testifying, this court will not disturb the
ons reached, especially since the record shows them
air and logical deductions from the testimony.
e case is tried in a court sitting as a court of chan-
e findings of fact are conclusive in the appellate
less they are so manifestly erroneous as to demon-
me oversight or mistake. *Wells v. Wells (Utah),*
Rep. 754; Ullman v. McCormic, 12 Col. 553 (21
p. 716); Doe v. Vallejo, 29 Cal. 386; Coryell v.
Cal. 567; Coolidge v. Smith, 129 Mass. 551. The
eals no material error committed during the con-

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duct of the trial, and we are of the opinion that the act of the city council of Salt Lake City granting the franchise to the appellant was unlawful as being an unreasonable exercise of discretion, and is therefore of no avail to it.

The judgment is affirmed.

MINER, J., concurs.

NOTE.—See note to *Green v. City & Suburban Ry. Co.*, post.

LOUISVILLE BAGGING MANUFACTURING COMPANY V. THE
CENTRAL PASSENGER RAILWAY COMPANY.

Kentucky Court of Appeals, Oct. 24, 1893.

(96 Ky. 50; affirming 3 Am. Elec. Cas. 236.)

ELECTRIC STREET RAILWAY.—ABUTTING OWNER.—INJUNCTION.

An abutting owner having sought to enjoin the construction and maintenance of an electric street railway upon the grounds (1) that it would interfere with his accustomed use of the street for backing vehicles up to his warehouse; and (2) would be dangerous to those residing or doing business on the street.

Held, that the first ground would not warrant an injunction, since the use to be interfered with was improper and forbidden by ordinance.

Also held, it appearing that the single trolley overhead system to be used by the defendant was the best yet devised; that the electric wire passes, not near abutting buildings, but in the center of the street; that the voltage required to run electric cars is not high enough to be dangerous, but that danger arises only from contact with broken telegraph or telephone wires falling upon the trolley wire; that the danger and inconvenience are trifling compared to the public benefit; and that the plaintiff had not shown unreasonable or illegal interference with his rights,—that the application for a temporary injunction was properly dismissed.

APPEAL from order of Louisville Law and Equity Court, setting aside preliminary injunction.

The facts are fully set forth in the opinion below, 3 Am. Elec. Cases, 236, which is here affirmed.

F. Hargis, for appellant.

phrey & Davie, for appellee.

THE LEWIS delivered the opinion of the court: The Louisville Bagging Manufacturing Company, a corporation, brought this action for an injunction, which was temporarily granted, restraining the Central Passenger Railway Company, a corporation, and its officers, from constructing or operating an electric railway on Walnut street, between Ninth and Twentieth streets, in the city of Louisville. The plaintiff has a large building used for manufacturing. Judge H. R. Thompson, judge of the Louisville City Court, was also enjoined from proceeding, until termination of the action, to try J. J. Tapp, president of plaintiff and its officers, upon warrants against them for cutting down and removing posts erected by the railroad company for use in running its cars.

THE RIGHT to construct and operate by electricity the railway on Walnut street, it appears, had been, before the action was commenced, granted to the company by resolution of the general council of the city of Louisville, duly passed, in pursuance of authority conferred upon it by the General Assembly. And as exercise of such authority by municipal legislation has been often sustained and recognized by this court, the right so given to the Central Passenger Railway Company must be regarded as valid and effectual as if conferred directly by the General Assembly. Moreover, as legislative power to authorize construction of a railway upon a public street, and operation of it by even steam, has been distinctly and affirmatively held by this court to exist, we see no reason to deny that it likewise authorize construction of such railway to be operated by electricity. For it is well settled that the use of a public street for travel and transportation by means of railway cars falls within the purposes for which streets are established and dedicated. And it is only when other modes of travel and transportation are prevented or unreason-

ably obstructed that courts can interfere to either enjoin or limit operation of railroads upon a public street.

It therefore seems to us the simple inquiry in this case is whether the manner in which the railway under consideration has been or is designed to be constructed and operated is such as to clearly impose a new and additional burden upon the land of plaintiff abutting Walnut street, and, as a consequence, entitling him to previous compensation for the right of way.

The first ground of complaint by plaintiff is that the railway track constructed in front of its manufacturing establishment will prevent loading and unloading vehicles used in transporting its goods and raw material in the manner heretofore done, which is by backing the wagon or dray up to and at right angles with the sidewalk. The answer to that complaint is, first, that such way of loading and unloading necessarily seriously obstructs, not merely operation of every double track railway, but proper use of a street for all other vehicles; second, there appears to be an ordinance of the general council prohibiting loading and unloading of vehicles in that mode.

The next ground is that operating an electric railway car upon a public street is dangerous to those who reside or do business thereon. Practical application of electricity as a power to drive machinery or to move carriages, as also for illuminating purposes, is of recent date, and it is shown the system best adapted for the purpose, if yet discovered, is by no means a perfect one. The evidence of experts and men having actual experience shows that three different systems for moving railway cars by electricity have been tried in this country, viz., the underground conduit system, storage battery system, and that of the overhead wire. And it fully appears that the two first are as yet so defective or imperfect that, of several hundred electric railways in operation, there are not a dozen to which either system has been applied, all others being run by the overhead wire or trolley system, the same used by the Central Passenger Railway Company.

before seems to us that in view of the benefit and
to the public of electric cars thus operated,
relatively little inconvenience or danger they are
usuals, it would be going beyond the province of a
contrary to decided weight of judicial authority,
or limit their use; especially when a party seeking
redy so signally, as has the plaintiff in this case,
show he has been unreasonably obstructed or
in his business, or that his rights have been
interfered with.

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The judgment dissolving the temporary injunction and dismissing the action is affirmed.

NOTE.—See note to next case.

JAMES E. GREEN V. THE CITY & SUBURBAN RAILWAY COMPANY AND THE BALTIMORE AND YORKTOWN TURNPIKE ROAD.

Maryland Court of Appeals, Jan. 11, 1894.

(28 Atl. Rep. 636.)

ELECTRIC RAILWAY ON TURNPIKE.—ABUTTING OWNER.

A turnpike company had, by successive statutes, obtained the right to lay a railroad track on its road; to grant to another company its privileges and franchises; to use on its railway "any motive power or system of traction whatever," and to lay an additional track where only one existed.

Held, that its grantee had the right to use and occupy part of the turnpike road for an electric railroad, without compensation to an owner of land bounded by the turnpike, but having no reversionary interest in the land occupied by it. Such owner is not entitled to an injunction restraining the railroad company from changing the grade of the road, although it impedes his ingress and egress; it appearing that the proposed new grade conforms to the requirements of the charter of the turnpike company; although a different grade had been in use for more than sixty years, in conformity to which adjacent land had been built upon and improved.

The construction and maintenance of an electric railroad does not impose an additional servitude so as to entitle an abutting owner to compensation therefor, although when the original compensation was made and the construction of the turnpike authorized, neither an electric nor any other railway was contemplated.

Case of this series cited in opinion: *Koch v. North Ave. Ry. Co.*, post.

APPEAL by plaintiff from decree of Circuit Court, Baltimore County, denying application for injunction and damages. Facts stated in opinion.

Pinkney Whyte, William H. Keech, and Z. H.
or appellant.

T. Cowen and E. J. D. Cross, for appellees.

J.: The bill was filed in this case by the appellant against the appellees, and prays for an injunction to restrain the defendants, and each of them, from making or suffering to be made any embankment or fill on the Baltimore and Yorktown Turnpike Road in front of appellant's premises; also for pecuniary damages and for general relief. It alleges, in substance, that appellant is the owner of a lot which fronts and abuts 50 feet on the turnpike road, and is improved by a dwelling house occupied by appellant; that the only access to said house and lot is by the said turnpike road; that, although the grade of the said road had been established for 60 or more years, the railroad had been for some months past engaged in constructing a new roadway on the easterly side of the turnpike road, which was to be used as a railway upon which trains were to be propelled by electricity; that, in thus constructing the said roadway or railway, cuts of 10 feet and upwards had been made in some places, and in other places embankments or fills of 10 feet and upwards had been made; that one of the said fills had been made on the easterly side of said turnpike road, in front of appellant's premises about 6 feet above the bed of the turnpike; that the railroad was about to extend said fill to the westerly side of the turnpike along and up to appellant's premises, by which he will be deprived of or seriously hindered in his right of access to his property from the turnpike, and the value of his property greatly diminished and almost destroyed, etc. It further alleges that improvements had been made by persons owning property abutting on the turnpike road on the belief that the grades, which had been established for 60 years or longer, could not be rightfully changed to the injury of such persons, thus depriving them of access to and egress from their property. It is also

alleged that a judgment at law against the railroad company would be of no avail by reason of a mortgage against its property, and that no action has been taken by the appellees to make compensation to appellant for the injury done and about to be done, if permitted, to his property. The charge is then made that it will be in violation of section 40 of the third article of the Constitution of Maryland to permit the appellees to proceed without first making just compensation, as it will be such a taking of the private property of appellant as is forbidden by the Constitution, except upon payment of just compensation first being made. The defendant companies filed separate answers, each of which denies that the railway company was grading the road, but admits that the turnpike company was, and claims that it was authorized to do so by its charter and the amendments thereto. They claim that the turnpike company has the right to change the grades in the road as may be necessary, and that the estate of the plaintiff in his property abutting upon said road is always subject to the right of the said turnpike company to alter its grades as public convenience should require from time to time. Various acts of the General Assembly are cited in the answers, and the decision of this court in *Peddicord's Case*, 34 Md. 463, is relied on as establishing the right of the turnpike company, under its charter, to make the changes complained of. They admit that the railway company proposes to use electricity as a motive power on its road. They deny that appellant has an interest or property in the premises which should be acquired by process of eminent domain. The evidence differs somewhat as to the height of the proposed fill in front of appellant's lot; that of plaintiff showing that it will be from about six feet at the highest point to a little over four feet at the lowest above the former level of the road, while that of defendants shows that it will be over four feet at the highest point and less than three feet at the lowest point. There is the usual contrariety of opinion of witnesses as to the effect of the contemplated changes on the value of the property. The court

w dissolved the temporary injunction previously granted. Being of opinion that *Peddicord's Case* was conclusive on this one.

The damage specially complained of by appellant is the interference with the ingress and egress to and from property by the proposed change of the grade of the turnpike road, which had been established for sixty or more years. This, he claims, constitutes a taking of private property, within the meaning of article 3, § 40, of the Constitution, which forbids private property from being taken for public uses without compensation being first made or tendered. So far as there will be any interference with appellant's access to the road, it will be caused by the change of the grade, and not by the electric railway, and, though it may be true that there would have been no change in the grade of the turnpike if an electric road was contemplated, the first point that suggests itself for consideration is whether the change in the grade can lawfully be made for any purpose under the circumstances of this case. If we answer this question in the affirmative, we must then determine whether the fact that the defendants, or either of them, propose, as they admit, to build or construct an electric railway on this changed grade will justify a court of equity in giving the relief sought in this case.

The act of 1804, c. 51, which incorporated the defendant turnpike company, also incorporated the Baltimore & Frederick Turnpike Road and the Baltimore & Reistersburg Turnpike Road; imposing the same duties and vesting the same powers in each. The court, in *Peddicord's Case*, which involve the rights and powers of the Baltimore & Frederick Turnpike Road, referred at length to the various acts of Assembly which affected those three companies, and hence it will not be necessary to quote as fully from them as we might otherwise do; but we will briefly refer to such portions of them as may be applicable. The act of 1787, c. 23, was the earliest legislation in this State in regard to turnpikes. That act provided that the roads

should be cleared 52 feet in width, grubbed and stoned 40 feet, and also provided for ditches, when necessary, of 6 feet in breadth. The act of 1801, c. 77, provided that the road should be cleared for the width of 66 feet, and that 21 feet thereof should be turnpike roads. Under those acts, the roads were in charge of public officers, and, as they had failed to meet the demand for good roads, the act of 1804, c. 51, was passed, and the companies thus organized were authorized to make their turnpikes on the roads already existing, which they did. The seventeenth section of that act required the companies to keep the roads open to the same width as they were originally laid out and confirmed by the commissioners of review and acts of Assembly previously passed, and to make artificial roads at least 20 feet in width of some hard substance, so as to secure a firm, and as near as the materials would reasonably admit, an even surface, and "so nearly level in its progress as that it shall in no place rise or fall more than will form an angle of four degrees with an horizontal line," etc. The acts of 1787 and 1804 provided for compensation to the property owners for such damages as they sustained by reason of the roads passing through their lands. The lands occupied by this company were presumably paid for, as provided for by the said acts; and by the acts of 1804, the company was required to pay Baltimore county for the money expended by it. The deed of the plaintiff does not attempt to convey to him any interest in the land occupied by the road, but, on the contrary, limits his lines to the westerly boundary of the road. It is not pretended that the turnpike company had ever complied with the requirement of its charter to build the road "so nearly level in its progress as that it shall in no place rise or fall more than will form an angle of four degrees with an horizontal line," etc., but it is claimed for the appellant that the turnpike company cannot now change the grade, especially after the acceptance of the acts of 1809, c. 2, 1811, and c. 202, which virtually admitted that the company had complied with its charter. The intent and effect of those acts, how-

ever, as was said in *Peddicord's case*, were to relieve the companies from the liability of having their property revert to the counties, and they did not operate as an agreement between the Legislature, the land owners, and the company that the then existing status of the road, in respect to grading, was to be its determinate condition, and that from thenceforth abutting property holders could not be interfered with by any new or changed grade. No act of the general assembly has been passed which took away the right of the company to conform to the grade contemplated by its charter, even if those above cited have relieved it from the requirement of doing so. It can hardly be contended that, because the Legislature relieves a company from a penalty or forfeiture of certain rights, incurred by reason of its failure to comply with the requirements of its charter, it can never thereafter comply with them. Nor is it sound reasoning to say that, inasmuch as this company had been violating its charter for 60 or 80 years, it should be forever thereafter required to violate it. We cannot adopt appellant's position that, because the grade in front of his property had been established (as it existed before the work referred to in these proceedings was commenced) for 60 or more years, therefore it cannot now be changed, and that the turnpike company is estopped from asserting its rights to change it, notwithstanding the requirements in its charter. In *Goszler v. Corporation*, 6 Wheat. 593, an ordinance had been passed by which it was ordained "that the said level and graduation when signed by the said commissioners or a majority of them and returned to the clerk of this corporation shall be forever thereafter considered as the true graduation of the streets so graduated and be binding upon this corporation and all other persons whatever and be forever thereafter regarded in making improvements upon said street." The plaintiff made his improvements according to the graduation made and returned to the clerk. Subsequently, the corporation proceeded to change the grade, and to cut down the street by the plaintiff's house. The plaintiff was refused relief by the court

below, and the Supreme Court of the United States, through Chief Justice MARSHALL, affirmed the decision on the ground that the power to grade the streets of the city was a continuing power, and that the corporation could alter the grade from time to time. The court said, "It cannot be disguised that a promise is held forth to all who should build on the graduated streets that the graduation should be unalterable;" but it held that the corporation could not abridge its power of changing the grades of its streets, which the Legislature had given it the power to do.

In this case the appellant, by an examination of the charter of the turnpike company and the amendments thereto, could have ascertained, not only that there was nothing in them to prevent a change of the grade, but that the charter required a different grade from the one in use when he purchased his property. Circumstances, might, as, in fact, they did, arise which would make it desirable for the company and the public to have their road as nearly level as possible, and no valid reason has been assigned why it should not be permitted to improve the grade of its road. But we think the case of *Peddicord v. Railway Co.*, 34 Md. 463, already cited, is conclusive of this question. That case determined the rights of the Baltimore & Frederick Turnpike Road, which, as stated above, was chartered by the same act as the Baltimore & Yorktown Turnpike Road. In that case the roadbed was cut down at the point complained of, while in this it was filled; but of course there could be no difference, so far as the rights of the abutting land owners are concerned. This court said, on page 474, that "the commissioners under the act of 1787, and the other authorities provided by the act of 1801, had the right, we think, and it was their duty, to cut down the bed of the road from time to time to any extent that was useful and beneficial to the road, and promoted the convenience of the public in using it, and this right and duty were transferred to the president, managers and company of the Baltimore & Frederick Turnpike Road by the act of 1804." Again, it is said, on page 477: "Our conclu-

sion is that the turnpike company acquired by its charter the right to grade, pave and use, in any manner that would promote the benefit and convenience of the public, for the purpose of a public highway, the whole 66 feet of roadway, or any part thereof, not less than twenty feet wide, and to grade the same to any angle less than four degrees, and that it retained that right up to the contract entered into between it and the appellee, and that the holding of the appellant was subject to that right by the company." Being of the opinion that the turnpike company has the right to change the grade of its road in front of appellant's property, it follows from what we have said that he is not entitled to compensation for any injuries to his property caused by such change in the grade. As was said by Justice GRIER, in *Smith v. Washington Corp.*, 20 How. 135: "The plaintiff may have suffered inconvenience and been put to expense in consequence of such action; yet, as the act of defendants is not unlawful or wrongful, they are not bound to make any recompense. It is what the law styles '*damnum absque injuria*.' Private interests must yield to public accommodation," etc.

It is contended, however, that the appellees cannot build an electric railway on the road without compensating the property owners for this "additional servitude," as it is alleged to be. The proof in the case is that the turnpike company was doing the grading, which is the act specifically complained of in the bill, and which we have determined it had the right to do. The tracks of the railway company occupy about one-third of the right of way of the road. They are to be laid on the easterly side of the turnpike road. There will be considerably more space outside of the railway tracks than the charter requires to be macadamized. The grade will be more desirable for the traveling public, and the property owners on the road will have the benefit of rapid transit. By the act of 1860, c. 259, the turnpike company was authorized to lay a railway track on the road between Towson and Baltimore, and by the act of 1872, c. 337, it was authorized to grant unto another com-

pany the railway privileges, franchises, etc., which it held. By the act of 1890, c. 225, it was authorized to use for the propulsion of cars on its railway tracks "any motive power or system of traction whatever," and to lay down an additional railway track upon the bed of the turnpike road where only a single track existed, "provided that no motive power or system of traction other than horses shall be made use of by the said corporation within the limits of the city of Baltimore without the consent of the mayor and council of Baltimore." On June 1, 1892, the turnpike company granted its railway privileges to the Baltimore Union Passenger Railway Company, and the City & Suburban Railw Company became the successor to those rights. We find, then, that the defendant railway company has obtained the rights and privileges of the turnpike company, which had received express authority from the Legislature to build railway tracks on its road, and to use "any motive power or system of traction" for the propulsion of cars. That authority certainly included the use of electricity, especially as it was granted in 1890, at a time when that motive power for cars was very generally used. It would seem to be perfectly clear, then, that this legislative grant so far legalized the use and occupation of part of this road for an electric railway as to protect the company from punishment for the maintenance of what might otherwise be a public nuisance.

It only remains to determine whether the rights of the appellant will be so specially affected as to entitle him to the restraining power of a court of equity to prevent the electric railway from being built or used, under the circumstances of this case. As we have already seen, the appellant has no interest in the land occupied by the turnpike company, and hence is not entitled to compensation as an owner of the reversionary interest therein. If he is entitled to the interference of a court of equity at all, it must be by reason of some special injury he, as an owner of abutting property, has sustained or will sustain, which will amount to a taking of his property, within

the meaning of the constitutional provision above referred to. He is not entitled to protection against mere consequential damages, which he suffers in common with others; and we have already said he is not entitled to compensation for the interference with the ingress and egress to and from his lot on account of the changes of the grade, as we have determined that the turnpike company had the right to make such changes. It is doubtless true that neither the Legislature of 1787, nor the property owners from whom the lands on which the road is built were obtained, contemplated the building of a railway on this road—especially one on which cars were to be moved by the use of electricity; but it is equally true that the law would not require this to be continued as a “dirt road,” simply because it was originally constructed in that way. This road will illustrate the progress that has been made within the past century. At first, it was a poorly constructed dirt road. Then it became a turnpike. Then part of its right of way was occupied by a horse-car railway, which, in its turn, must now give way to an improved method of travel on public highways. To quote from *Peddicord's case*, on page 481: “It may be said to have been within the legal contemplation of all that it was to be used for all purposes by which the object of its creation as a public highway could be promoted.” In that case it was expressly decided that the building of a horse-car railway on the Baltimore & Frederick turnpike was not a new servitude. This court has also determined, in *Hodges v. Railway Co.*, 58 Md. 603, that the use of the streets of a city or town for the purposes of a horse railway is not an additional servitude, for which adjoining lot owners are entitled to compensation; and in *Hiss v. Railway Co.*, 52 Md. 242, the same doctrine was applied to a road or street just outside of the corporate limits of the city of Baltimore. In fact, this may be accepted as the established law of this country, with very few exceptions. Many of the cases on the subject are collected in the note to section 82, in Booth on Law of Street Railways. Some of these authorities have distinguished

between horse-car railways in the streets of cities and towns, and those on the country roads; but if we were inclined to adopt the distinction at all, we would not under the circumstances of this case, especially as the question is settled in a case so similar to this as that of *Peddicord, supra*. As the use of electricity as a motive power is comparatively new, there have not been as many decisions concerning electric railways as horse-car railways; but we are not without authorities on the question whether they constitute new servitudes which entitle abutting owners to compensation. Those from other States might be cited, but the recent case of *Koch v. Railway Co.*, 75 Md. 222, 23 Atl. 463, decided that a street is a way set apart for public travel, and the use of electricity for propelling street cars is but a new and improved motive power. in no manner inconsistent with the uses and purposes for which streets were opened and dedicated as ways for public travel; that the mayor and City Council of Baltimore had the power to authorize this use of electricity, and that the use does not impose a new servitude upon the streets, so as to entitle abutting lot owners to additional compensation. Of course, the railway company may make itself liable to the appellant by a negligent construction or maintenance of the road. Those using electricity as a motive power on public highways, such as the turnpike referred to in this case, must remember that they have not the exclusive right to the highway, and must respect the rights of others equally entitled to use it. If they do not, of course the law will require them to do so. It will be incumbent on the turnpike company to keep the road in proper condition for vehicles other than street cars, and of the width required by its charter. The railway company must so construct its tracks and run its cars as not to unnecessarily or improperly interfere with the rights of others in the use of this public highway. If either company fails to discharge its duties to the public, the proper tribunal will give relief to those injured; but we cannot anticipate defaults or acts of negligence on the part of the defendant com-

panies, or either of them, and must dispose of this case as it is now presented to us. We think it clear that, under the evidence and the authorities — especially *Peddicord's case*, which we have no desire to disturb or modify — the appellant is not entitled to the relief asked for in this case, and the decree of the court below must be affirmed. Decree affirmed, with costs to the appellees.

NOTE.—In *Buffalo, &c., Ry. Co. v. Dubois Traction Pass. Ry. Co.*, Pennsylvania Supreme Court, May 2, 1892, 24 Atl. R. 179, the question at issue was the right of an electric street railway to cross a steam railroad at grade; and a point incidentally under consideration was the construction of a statute empowering the court to compel crossings above or below grade; the complainant contending that it had no application to the street railway. Upon this point the Court of Common Pleas, to which application to continue a temporary injunction was made, after discussing generally the difference between steam and street railways, and apparently agreeing with the declaration made in *Taggart v. Newport St. Ry. Co.*, 3 Am. Elec. Cas. 806, viz.: “We think it is settled by the greater weight of decision that railways constructed in a street or highway and operated by steam, in the usual manner, impose a new servitude, and entitle the owner of the fee to an additional compensation, but that a street railway operated by horse power, as such street railways are ordinarily operated, does not impose any new servitude,” continues as follows:

“This, then, brings us to the consideration whether the use of electricity, instead of horse power or cable power, changes the legal results. The Supreme Court of Rhode Island, in discussing this, in the case of *Taggart v. Railway Co.*, *supra*, says: ‘It is not the motor, but the kind of occupation, whether practically exclusive or not, which is the criterion. The street railway here complained of is operated neither by horse nor steam power, but by electricity. It does not appear, however, that it occupies the street or highway any more exclusively than if it were operated by horse power. Reference has been made to cases which hold that telegraph and telephone poles and wires erected on streets or highways constitute an additional servitude, entitling the owners of the fee to additional compensation; and from these cases it is argued that the railway here complained of is an additional servitude, by reason of the poles and wires which communicate its motive power. There are cases which hold as stated, and there are cases which hold otherwise; but, assuming that telegraph and telephone poles and wires do create a new servitude, we do not think it follows that the poles and wires erected and used for the service of said street railway likewise create a new servitude. Telegraph and telephone poles and wires are not used to facilitate the use of the street where they are erected for travel and transportation, or, if so, very indirectly so,

whereas the poles and wires here in question are directly ancillary to the uses of the streets as such, in that they communicate the power by which the street cars are propelled.' The decision of the Supreme Court of Pennsylvania in *Lockhart v. Railroad Co.*, 189 Pa. St. 419; 21 Atl. Rep. 26, is practically the same in its legal results. Electricity is too valuable a power not to be utilized; and, whenever it can be harnessed and compelled to minister to the comfort of the poorest of our people, no unnecessary legal obstacle ought to be thrown in the way. The true test in the application of the power in the hauling of street railway cars is, does it interfere with the use of the street by the public? If it does not, or if the interference is slight compared with the benefits which flow to the public in the use of the street and highway in conformity with the original dedication to public uses, then it cannot be held to impose a new servitude upon the street or the abutting property owners." This decision was affirmed by the Supreme Court.

In *Joseph H. Harner v. Columbus Street Car Railway Company*, Franklin county (Ohio), Common Pleas, June, 1893 (29 Weekly Law Bulletin, 387), it was held that the fact that a street railway company has been by municipal ordinance permitted to change from horses to electricity and that such change and increased travel demand better facilities, including additional or extended switches, does not authorize it to make such addition and extension without further municipal authority, and without obtaining the consent of abutting lot owners who may be affected by the alteration.

The foregoing fourteen cases relate to the rights of abutting land owners with respect to maintenance of electrical appliances in highways.

Other cases upon the same subject may be found in the indexes, to vols. 1 and 2 under title "Poles and Wires in Streets; Rights of Abutting Owners;" in vol. 3 and the present volume, under title "Abutting Owners."

A note in which the earlier cases are summarized and classified to some extent may be found at page 348 of vol. 3.

With respect to the question whether or not the maintenance of such appliances constitutes a new easement for which the abutting owner is entitled to compensation, the decisions in the foregoing cases develop as follows:

In California (*Pac. Post. Tel. Cable Co. v. Irvine*, p. 140), it is held that a telegraph line imposes an additional burden; and the contrary in Vermont (*Rugg v. Com. Un. Tel. Co.*, p. 142).

In New York (*Blashfield v. Empire State Teleph. & Tel. Co.*, p. 146), it is held that the maintenance of telephone lines imposes a new servitude.

In Pennsylvania (*Haverford Elec. Lt. Co. v. Hart*, p. 148), held that the maintenance of electric light appliances creates a new burden.

All the others are electric railway cases; and in all it is agreed that the erection and maintenance of electric street railways for the overhead trolley system imposes no new burden for which the owners of abutting property are entitled to compensation.

In several of the cases, however, attention is called to the fact that the

appliances must be so erected as to create the least possible danger and obstruction in the street.

Another matter of importance to owners of land abutting upon highways, to wit, their rights with reference to the destruction or mutilation of shade trees to suit the convenience of electrical companies, is considered in the following case, and in the note thereto.

**SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY V.
D. F. CONSTANTINE.**

U. S. Circuit Court of Appeals, Fifth Circuit, Jan. 9, 1894.

(69 Fed. Rep. 61.)

TELEPHONE COMPANY.—ABUTTING OWNER.—MUNICIPAL CONTROL.—TRESPASS.

A telephone company, invested with the right of eminent domain, and authorized by law to occupy the streets with its poles and wires, was required by the city to remove them from the street to the sidewalk. In doing so it became necessary to remove limbs from trees in front of plaintiff's property. This was done under the direction of a city officer. Held, that the act being done under lawful authority the company was not liable in trespass to the plaintiff.

ERROR to Circuit Court for the Southern Division of the Northern District of Alabama. Action of trespass. Appeal by defendant below. Facts stated in opinion.

Hewitt, Walker & Porter and Geo. F. Feasons, for plaintiff in error.

Lane & White and W. K. Terry, for defendant in error.

Before PARDEE and McCOORMICK, Circuit Judges, and TOULMIN, District Judge.

TOULMIN, District Judge: The defendant in error, being the owner of a lot of land abutting on a public street, in the city of Birmingham, in the State of Alabama, brought suit against

the plaintiff in error to recover damages for the cutting and disfiguring of certain trees growing on the sidewalk in front of said lot. The first count in the complaint claims damages for wrongfully and wantonly cutting and injuring the trees; and the second count, for wrongfully, wantonly, wilfully, and maliciously cutting and disfiguring them. The defendant (now plaintiff in error) filed a special plea to the complaint, designated as "Plea No. 4," in which it was averred that, for several years prior to the injury complained of, it had erected and maintained its telephone poles and wires along the street in front of plaintiff's (now defendant in error) lot, on which the trespass complained of is alleged to have been committed; that after it had so erected its poles and wires, and before the commission of the alleged trespass, the municipal authorities of the city of Birmingham, by ordinance duly enacted, required it to move its poles and wires from the position they had previously occupied, and to place them inside the curb, on the sidewalk; that in complying with this ordinance it became necessary to cut and trim the trees alleged to have been cut by defendant; that the street in front of plaintiff's lot, where said alleged trespass was committed, is a highway of the city of Birmingham; and that the poles and wires were so placed that they did not interfere with the ingress and egress to and from the plaintiff's lot, and did not exclude the air and light therefrom. The ordinance was made a part of the plea. The plaintiff interposed a demurrer to this plea, which was sustained by the court, and this ruling of the court is assigned as error.

The contention on the part of the plaintiff in error is that each count of the complaint is in trespass, that trespass will not lie where the act complained of is done under lawful authority, and that the plea shows the alleged trespass was committed under lawful authority. Our attention has been called to two cases recently before the Supreme Court of Alabama, identical in all material facts with the case at bar, and the complaints in those cases are almost identical with that in this case. The material averments are the

same. In the opinion in those cases, the court say that "concurrent legislative and municipal authority, granted to such a company, to erect its poles and suspend its wires in and over the streets of a city, will protect it from being treated as a trespasser, and its work from being declared a nuisance, if its works are so constructed as not to obstruct or interfere with the use of the streets by the public, or the property owner's right of ingress and egress to and from his abutting property." The court further held that in complying with the city ordinance requiring the removal of telegraph and telephone poles from that part of the street used by vehicles to the sidewalk, "if it became necessary to trim or remove the trees in front of appellee [defendant in error in this case] property, neither the city nor the appellant [plaintiff in error here], acting under authority of, and in obedience to, the ordinance, can be regarded as trespassers." *Telegraph Co. v. Frances*; *Same v. Allen* (cases not yet officially reported; rehearings pending); 2 Dill. Mun. Corp. § 688; *Bills v. Belknap*, 36 Iowa, 593. The court, in the opinion quoted from, expressly decides that the plaintiff in error had legislative and municipal authority granted to it, and that, in acting under such authority, it could not be regarded as a trespasser. In reaching this conclusion, the court, clearly, had reference to the authority of plaintiff in error under the statutes of the State of Alabama relating to telephone and telegraph companies, and to the charter act and ordinance of the city of Birmingham. We concur in the reasoning and conclusions of that court, and think we can safely adopt the ruling in construing the complaint in the present case. The conclusion is that the facts averred in the defendant's said plea were a complete answer to the complaint, and that the court below erred in sustaining the demurrer to it.

But it may be considered that the ruling of the court on the demurrer was error without injury, inasmuch as it appears from the record that the plaintiff in error was deprived of no substantial right in presenting the defense set up in the plea. It does appear that the facts

averred in the plea were, without objection or restriction, substantially proven on the trial. The question raised on the pleading by said plea is raised on the facts by the general charge of the court, and by the first and third special charges as to the first count of the complaint, and by the fourth special charge as to both counts. These special charges, among others, were requested by the plaintiff in error, and were refused by the court, to which refusal exception was taken, and on which error is assigned. The special charges are as follows:

“(1) The court charges the jury that, if they believe the evidence in this case, they must find for the defendant on the first count of the complaint.” “(3) That if the jury believe from the evidence that defendant had erected its line of telephone poles and wires along Nineteenth street, and on the outside of the curbing, by the permission of the mayor and aldermen, and had maintained and operated the same for several years, the fire department of the city having the exclusive use of one of the wires for the communication of the alarm of fire to said fire department, and that the mayor and aldermen passed the ordinance introduced in evidence, and you further believe from the testimony that, in order to comply with said ordinance, it was necessary to trim or cut the trees, to some extent, so as to operate the wire on said poles which was used by the fire department of the city, then I charge you that your verdict must be for the defendant under the first count of the complaint. (4) That if the jury believe from the evidence that the defendant had erected its line of telephone poles and wires along Nineteenth street, and on the outside of the curbing, by the permission of the mayor and aldermen, and had maintained the same for several years, the fire department of the city having the exclusive use of the wires for the communication of the alarm of fire to said fire department, and that the mayor and aldermen passed the ordinance introduced in evidence, and you further believe from the testimony that, in order to comply with said ordinance, it was necessary to trim or cut the trees, to some extent, so

as to operate the wires on said poles which were used by the fire department of the city, then I charge you your verdict must be for the defendant."

The court, among other things, charged the jury as follows:

"It is admitted in the testimony — the testimony shows — that the employes of the telephone company did the cutting, but it is said it was done under the superintendence of the city; and they say not only that, but there is evidence to show that the hands of the telephone company were all of them paid by the telephone company all the time. I think there is no question about that. But the matter was turned over, in some formal or informal way, by the telephone company, to the city authorities, and the city authorities are responsible, and the telephone company in no way responsible. On that subject I have this to say: That if the city authorities, in what they did by way of superintendence or direction given to these employes of the telephone company, if they did it — if the action of the city authorities was at the instance and request of the officers of the telephone company, and if the telephone company accepted the result — then the telephone company is liable for the damages, if any."

To which the plaintiff in error excepted, and assigns the same as error.

These charges raise the question whether an action of trespass would lie in the case shown by the evidence. The case is that the plaintiff in error — a corporation invested with the right of eminent domain under the law of the State of Alabama, and authorized by law to erect poles and stretch wires thereon through the streets of Birmingham, Ala. — was required by an ordinance of that city to remove its poles and wires from the street on which the lot of defendant in error is situated, and to place them on the sidewalk in front of the lot. The trees that were cut were on the sidewalk, about 31-2 feet from the curbstone, and were from 12 to 16 inches in diameter. The plaintiff in error claims — and the evidence tends to prove — that, in complying with the ordinance, it became necessary to cut and

remove many of the limbs of the trees in order to move the poles and wires inside the curb on the sidewalk, and to prevent their interference with the wires after the poles were removed, and the wires suspended on them. The mayor of the city was informed of this, and he promised to obtain the consent of the owner of the lot for the trees to be cut. Subsequently, the mayor, having failed to see the owner and obtain such consent, sent an officer of the city fire department to superintend the cutting of the trees, and under his direction the work was done by the employes of the plaintiff in error. It does not appear that the trees were cut more than was necessary to properly suspend said wires. There was also on the same pole a fire alarm telegraph wire, the property of the city, and used in connection with the fire department. This wire was also removed with the poles and wires of the plaintiff in error, and was below and nearer to the tops of the trees than the wires of the plaintiff in error. The ordinance of the city of Birmingham, before referred to, was in evidence. On the case made there is no liability, in this suit, on the plaintiff in error. The court, in our opinion, erred in sustaining the demurrer to the special plea in the charge given to the jury, and in the refusal to give the charges requested by the plaintiff in error, and set out in this opinion. Reversed and remanded.

NOTE.—In *J. J. Clay v. Postal Tel. Cable Co.*, Mississippi Supreme Court, Oct. 1892 (70 Miss. 406), it was held under a statute empowering county boards of supervisors to permit telegraph companies to erect telegraph lines in highways, that they acquired no power to permit the removal of trees or limbs upon the margin of a highway.

Also, that a telegraph company was liable to an abutting owner for trees cut by its employes, though in the absence, and against the positive order of its superintendent, if his absence, entrusting the work to ordinary laborers without supervision was an act of negligence.

McCruden v. Rochester Ry. Co., Monroe (N. Y.) Circuit, June, 1893 (5 Misc. 59.); affirmed without opinion, by General Term, March 27, 1894 (38 N. Y. Supp. 1135); was an action for trespass for cutting shade trees claimed to belong to an abutting owner. It does not appear that the defendant operated an electric railway, but the principal points decided would doubtless apply to any street railway.

Telegraph Cable Co. v. Railroad Co.

It was held, that it appearing that the plaintiff owned to the center of the street, a motion for non-suit on the ground that there was no evidence that the plaintiff was the owner of the land on which the trees stood, was properly denied.

Held, also, that defendant's claim that it had the right to occupy the street in front of the plaintiff's premises and to lay its tracks thereon, without compensation to the owner of the fee, because it had received permission from the common council of the city to locate the tracks in that place, and they had been so located by direction of its executive board, was untenable.

The plaintiff was allowed to recover triple damages, under the New York Code; that is, three times the difference in value of the land in front of which the trees stood, before and after the cutting down of the trees.

For other cases upon this subject, see INDEX to vol. 2, title "Trespass."

POSTAL TELEGRAPH CABLE COMPANY V. NORFOLK &
WESTERN RAILROAD COMPANY.

Virginia Court of Appeals, March 24, 1892.

(88 Va. 920.)

EMINENT DOMAIN.—TELEGRAPH COMPANY.—RAILROAD RIGHT OF WAY.

A statute authorizing telegraph companies to maintain their lines "along and parallel to" railroads, does not authorize the condemnation by a telegraph company of a right of way along and upon a railroad right of way.

CONDEMNATION proceeding. Appeal by telegraph company, plaintiff below. Facts stated in opinion.

J. S. Parrish, Edgar Allan and E. C. Burks, for plaintiff in error.

Robert Stiles, A. L. Holladay and George S. Bernard, for defendant in error.

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Error to judgment of Circuit Court, Prince George county, in a proceeding in the County Court of said county, by the plaintiff in error, the Postal Telegraph Cable Company, to condemn the land of the Norfolk & Western Railroad Company for the use of the plaintiff in error, in erecting its line upon the right of way of the railroad company. This is sequel to *Postal Tel. C. Co. v. N. & W. R. R. Co.*, 87 Va. 349.

When the case went back for further proceedings the County Court fixed a day for the commissioners to act in the condemnation proceedings to ascertain the damages to be paid by the plaintiff for the right of way desired. This was done, and the commissioners fixed the damage at \$200, and the County Court of Prince George county approved the report of the commissioners. The Norfolk & Western Railroad Company applied for and obtained a writ of error to the said judgment of the County Court, and, the case coming on to be heard in the Circuit Court of Prince George county, upon said writ of error, the said court reversed the judgment of the said County Court of Prince George county, and dismissed the proceedings instituted in said County Court by the Postal Telegraph Cable Company against the Norfolk & Western Railroad Company for the condemnation of the property of the railroad for the use of the telegraph company; whereupon the plaintiff in error, the Postal Telegraph Cable Company, applied for and obtained a writ of error to this court.

LACY, J., delivered the opinion of the court: The error assigned by the plaintiff in error is that the Circuit Court erred in reversing the order of the County Court in the premises, it being plainly right, proper and justified by the law, which had been strictly followed in all the proceedings in the said County Court. The County Court held that, by virtue of Code of Virginia, sections 1287-1290, the Postal Telegraph Cable Company acquired the right to enter upon the right of way, road-bed and lands of the Norfolk & Western Railroad Company, and by regular condemnation proceedings in the County Court of that county

take such land of the railroad company as might be requisite for their purposes for the construction of the line of the telegraph company, upon paying such compensation therefor as the commissioners should fix and the County Court approve, which was done accordingly. Upon writ of error to the Circuit Court this judgment of the County Court was reversed, and the condemnation proceedings dismissed, as stated ; these two courts differing as to the proper construction of the foregoing sections of the Code ; the plaintiff in error insisting that the act in question gives it the right to go upon the railroad land, which had been acquired for railroad purposes, and the County Court agreed with it ; the defendant in error contending that the telegraph company had no right to go upon its land, but only along side of its right of way, or strip of land 100 feet wide, but not on it, and the Circuit Court agreed with it.

We must first here consider the act in question, and its terms, in order to decide between them. Let us see what is provided by law. Section 1287 provides as follows :

Every telegraph and telephone company incorporated by this or any other State, or by the United States, may construct, maintain and operate its line along any of the State or county roads or works, and over the waters of the State, and along and parallel to any of the railroads of the State, provided the ordinary use of such road, works, railroad and waters be not thereby obstructed ; and along or over the streets of any city or town, with the consent of the council thereof.

Section 1288 provides for contracts for right of way. In this case no contract was or could be made, the railroad company refusing to contract, upon the grounds (1) that the company had already made such a contract with one telegraph company to go on its right of way, and (2) that another line of telegraph would encumber and embarrass their operations, and obstruct the ordinary use of their road. Section 1289 provides :

If the company and such owner cannot agree on the terms of such contract, the company shall be entitled to such right of way, upon making

just compensation therefor to such owner. Such compensation shall be ascertained and made as provided in chapter 46 of the Code for the acquisition of land by a company incorporated for a work of internal improvement, when such internal improvement company cannot agree on the terms of the purchase with those entitled to the lands wanted for the purposes of the company,

and that the title acquired by the telegraph company shall be only a right of way. Section 1290 provides for a repeal, at the pleasure of the general assembly. Section 1074 of the said chapter 46, mentioned in section 1289, *supra*, is cited by the defendant in error to show that the condemnation provided for there, and which is made to apply here by section 1289, provides, as to the condemnation of land, that the commissioners for condemnation shall be appointed by the county in which the land, or the greater part thereof, lies, for the purpose of obtaining a just compensation therefor. And the defendant in error shows that the land of the railroad company lies in six counties, so far as the same is sought to be taken, and that the greater part thereof does not lie in Prince George county; and the contention is that the land of the railroad company cannot be condemned by sections, but must be condemned in its entirety as a whole, and by one tribunal, that there may be a just and even rate of compensation. If there can be any condemnation under the act in question, still insisting that there is no authority for the condemnation, nor entry on its lands, it is insisted further that the Legislature, although intending to authorize the condemnation, has not provided the adequate machinery or proceeding to accomplish it; that it has provided no tribunal to ascertain the measure of damages, nor the mode of condemnation.

It is obvious that the first question for us to consider is, what is the true construction of section 1287 of the Code? The act authorizes the telegraph company to construct its line along any of the State or county roads or works, along or over the streets of a town or city. As to the railroads, it provides that the telegraph company may construct its line "*along and parallel to*" any of the railroads of the

State. Are the phrases "along any of the State or county roads," "along and parallel to" any of the railroads, etc., grants of the same character? Is the word "along" synonymous with the phrase "along and parallel to?" Both are used in the same section; the former as to the county roads, the latter as to a railroad. The authority is given to go along the county road, but the authority is to go along and parallel to the railroad. Did the Legislature mean to give the right to go along the railroad, and therefore upon it? The plain significance as to the county road is to go along, upon, or on it; and this is the way the county road is used by the public. It is a highway for the use of the public, and all the good people of the Commonwealth may pass along in it or upon it, at their pleasure, and in their own way. That is the object of its construction, there being compensation for any additional servitude placed there. The railroad is a highway of a different sort. It is of a peculiar sort. It is for the use of the public, and the people may go on it, but only according to the prescription and the mode prescribed by its owners. Its use by its owners is exclusive. No other person or persons can go upon it except by the leave or the license of its owners, under the penalty prescribed by law against trespassers. It is operated by the dangerous and powerful agency of steam, and its use is not only, by its nature and character, exclusive, but, by virtue of its charter and organization, it must be exclusive. To grant its use to others would be to destroy its value and usefulness. If the Legislature intended to give the right to go upon the railroad in the same way as upon the county road, it would reasonably have employed the same term. The terms had already been employed in the same sentence. It would have doubtless said "along the State and county roads or works and the railroads;" but, observing that such a provision would have been necessarily ineffectual, the phraseology was altered, and the right is given to go along and parallel to. It is not pretended that this meant upon a railroad track, but the claim is that the meaning is "along

the right of way and parallel to" the track; but plainly there is no such provision. If such had been the legislative intent, such would have been the legislative enactment. The law as to the railroad does not use the word "along," either as to the right of way or as to the track. It is used as to the county road, "go along the road;" but there is no such provision as to the railroad; go, not along the railroad, but "along and parallel to" it. The Legislature meant what it said. We have no other means of discovering the intent. And if the telegraph company had gone "along and parallel to" the railroad this controversy could not have arisen in this form, unless it had gone along and parallel to the railroad in such manner as to obstruct the ordinary use of the railroad, which might have been possible or not, according to the structures erected by it.

In the construction of statutes it is said that it is not permitted to interpret what has no need of interpretation. When it is expressed in clear and precise terms—when the sense is manifest, and leads to nothing absurd—there can be no reason not to adopt the sense which it naturally presents. To go elsewhere in search of conjectures, in order to restrain or extinguish it, is to elude it. And the popular, received import of words furnishes the general rule for the interpretation of public laws, as well as of private and social transactions; and, wherever the Legislature adopts such language in order to define and promulge their action or their will, the just conclusion from such a course must be that they not only themselves comprehended the meaning of the language they have selected, but have chosen it with reference to the known apprehension of those to whom the legislative language is addressed, and for whom it is designed to constitute a rule of conduct—namely, the community at large. *Maillard v. Lawrence*, 16 How. 251; *Arthur v. Morrison*, 96 U. S. 111; *Greenleaf v. Goodrich*, 101 U. S. 284. The intention of the Legislature is to be found from the act itself, from other acts *in pari materia*, and sometimes from the cause or necessity of the act; and, when the intent can be discovered, it should be followed

with reason and discretion, though such construction seem contrary to the letter, where the words are obscure; and every part of it should be viewed in connection with the whole, so as to make all of its parts harmonize if practicable, and give a sensible and intelligent effect to each. It is not to be presumed that the Legislature intended any part of the statute to be without meaning, and all statutes *in pari materia* are to be read and construed together, as if they formed parts of the same statute and were enacted at the same time. The cause and the necessity of this statute were to provide a method by which the telegraph company could procure the right of way for their lines through and across the State. The public roads belong to the State. To pass along and over for all the purposes of the people of the State, they are allowed to go along the public roads. The waters and public works also belong to the State, and they are allowed to go over them. It was desired to go over the railroad for this purpose, and these are public ways also, within the limitations stated. The railroad furnishes a convenient mode of transportation, and it was desired to avail of these facilities and erect the lines convenient to these for purposes of access for erection and repairs, etc. When the Legislature came to pass upon this question, it is not provided, as it is with reference to county and State roads, the right to erect their lines on the railroads, nor along the railroads, simply, but "along" is coupled with other words, without which it cannot be considered. "Along" is not there alone in the statute, proceedings shall be in the County Court of the county where the greater part of the land lies, which is not true as to the county of Prince George in this case. But none of these questions can arise in the view we have taken of the case. The telegraph company is not authorized to condemn the railroad land or right of way in any court; and the judgment of the Circuit Court appears to be plainly right, and must be affirmed.

LEWIS P., and HINTON, J., *dissented*.

JUDGMENT AFFIRMED.

Telegraph Cable Co. v. Telegraph Co.

NOTE.—For cases in which it has been held that a telegraph company may by condemnation proceedings acquire a right of way upon that of a railroad, see *New Orleans, &c. R. R. Co. v. So. & Atl. Tel. Co. (Ala.)* 1 Am. Elec. Cas. 190; *W. U. Tel. Co. v. Am. Un. Tel. Co. (Ga.)*, id. 303.

PACIFIC POSTAL TELEGRAPH CABLE COMPANY V. WESTERN
UNION TELEGRAPH COMPANY.

THE SAME V. SEATTLE, LAKE SHORE & EASTERN RAILWAY
COMPANY.

United States Circuit Court, District of Washington, N. D., April 4, 1893.

(50 Fed. Rep. 493.)

TELEGRAPH LINE UPON RAILROAD RIGHT OF WAY.—CONSTRUCTION OF
CONTRACT.—ULTRA VIRES.—EXCLUSIVE PRIVILEGE.

A contract by which a railroad company granted to a telegraph company the right to use its right of way for a telegraph line and agreed not to grant such right to any other telegraph company, *held*, to vest no such exclusive interest in the telegraph company in the right of way of the railroad company as to entitle it to an injunction against the construction of another telegraph line thereon.

If the contract did grant such exclusive right to a single telegraph company, it would be *ultra vires* and void.

MOTION to vacate order granting injunction *pendente lite* to prevent the Western Union Telegraph Company from constructing and operating a telegraph line on the right of way of a railroad. Facts stated in opinion.

Struve & McMicken and Hughes, Hastings & Medman, for plaintiff.

Turner & McCutcheon, for defendants.

HANFORD, District Judge: The only ground for the restraining order, which, at the time it was made, seemed to me to justify it, is that the complainant claims to be the

owner of an interest in the strip of land known as the right of way of the defendant the Seattle, Lake Shore & Eastern Railway Company, upon which the defendant the Western Union Telegraph Company proposes to enter, and construct and operate a telegraph line, without the consent of the plaintiff, and without compensation to the plaintiff for such appropriation and use of property to which it claims title. Upon the present hearing this appears to me to be the only ground of complaint, worthy of consideration, against either of the defendants. I would regard it as sufficient if the claim of title appeared to be valid. The defendants, however, deny that plaintiff has any title to the premises, or any interest therein other than an easement; that is to say, a right of way for its own telegraph line. The only basis for the plaintiff's claim of title is found in the following clauses of a contract made by the plaintiff with the Seattle & West Coast Railway Company.

The railway company hereby grants right of way for said line of telegraph along the route of its road, and upon its grounds, and agrees to furnish labor for loading the poles upon the cars, and for distributing and setting the same, under the direction of the telegraph company's foreman, together with their free transportation. The railroad company agrees to furnish office room in its railway stations, and an operator whenever required, for its railway business, who shall also transact the business of the telegraph company, at such stations, under the rules and regulations of the telegraph company, it being understood that all receipts for commercial telegraph business shall belong to the telegraph company. * * * The telegraph company shall have free transportation for men and material necessary for the maintenance and operation of its telegraph lines, and the railway company hereby agrees that it will not grant right of way along its road for the construction of the line of any other telegraph company, and that it will not transport men or material for any other telegraph company except at the regular tariff rates of said railway company, and for delivery at its regular stations. * * * This contract shall continue for twenty-five years from the date hereof.

The complainant avers that the Seattle, Lake Shore & Eastern Railway Company acquired the right of way for that portion of its road between Woodenville or Snohomish Junction and the town of Sedro, by a grant from the said Seattle & West Coast Railway Company, subject to said contract.

The argument is that the contract is a conveyance, and that it vests in the complainant the exclusive right to the entire strip of land for telegraph purposes, during the term specified, which right amounts to an interest in the land, and is a legal estate. Against the contention for such a construction of the contract, it is, first, to be observed that the only granting words therein appear to be limited in their application to the right of way for a single telegraph line. There is no indication in the contract of the idea that the plaintiff should have the control over the right of way for any purpose other than the conduct of its own telegraph business. If correct in the position assumed by it in this case, the complainant would have the right to sell to other telegraph companies, or sublet to them privileges to construct and maintain telegraph lines upon the premises. The provisions of the contract itself in the clauses above quoted are antagonistic to this pretense. The railway company by the contract promised that it would not permit the construction of other telegraph lines upon its right of way, nor afford other telegraph companies facilities for transportation of materials, except as specified. This clause created a mere personal obligation. It did not convey the title to any property. On the contrary, it amounts to an assertion by the railway company of both an obligation and a right to control the future use of the ground acquired by it for its railroad.

If the contract, in explicit terms, granted such an interest in the premises as plaintiff claims, I should have to hold it as *ultra vires* and void, for the reason that the laws of the Territory of Washington, in force when it was made, did not authorize a railway corporation to transfer land acquired for railroad purposes, by lease, so as to divest itself of its duties and obligations to the public as to the use of such property. By the plaintiff's own showing it appears that the Seattle & West Coast Railway Company was incorporated to do general transportation business by rail, and to be a competitor for interstate and international commerce. Its franchise from the State, there-

fore, made it to a certain extent a public agent endowed with part of the sovereign power of the commonwealth; and a railroad constructed in this State by a corporation organized under the laws of the State, or its predecessor, the Territory, must necessarily be a highway for public use, in and to which the public have rights limited and regulated by law. There is no statute authorizing such a transfer of property in the right of way and control thereof as the plaintiff now claims was made to it by said contract, and without express authority conferred by a statute, no transfer of such property, or of the right to control the same, could be made, whereby the rights of the public, or a third party, *e. g.*, the Western Union Telegraph Company, could be in any manner abridged. *Lakin v. Railroad Co.* (Or.), 11 Pac. Rep. 68; *Breslin v. Car Co.* (Mass.), 13 N. E. Rep. 65; *Palmer v. Railway Co.* (Idaho), 16 Pac. Rep. 553; *Railroad Co. v. Brown*, 17 Wall. 445; *Railroad Co. v. Crane*, 113 U. S. 433, 434 (5 Sup. Ct. Rep. 578); *Oregon R. & N. Co. v. Oregonian Co.*, 130 U. S. 1 (9 Sup. Ct. Rep. 409); *Van Dresser v. Navigation Co.*, 48 Fed. Rep. 202; *U. S. v. Western Union Tel. Co.*, 50 Fed. Rep. 28.

Telegraph lines are to serve the public, and wherever they are connected with a railroad as incidental to the railway business, the rights of the public respecting the same must be governed by the principles applicable to other branches of the service; and the public policy which underlies the numerous decisions of the courts of this country, denying the right of a railway corporation to divest itself of responsibility and invest another with its powers and functions, touches directly the question in this case as to the right of one corporation to transfer to another an exclusive right for telegraph purposes to the occupancy and control of property acquired as a necessary means of serving the public. A contract made by a railway company, whereby it attempts to create a monopoly in the use of its property for the transmission of news and intelligence, is just as invalid as a contract would be whereby a railway corporation should attempt to confer upon one

individual or corporation an exclusive right to have any particular commodity transported as freight over its railway. Whether this contract be regarded as an intended conveyance of an interest in the property, or as a covenant affecting the title to the right of way, or as a contract creating simply a personal liability, it is not such a contract as a court of equity can uphold or decree to be specifically performed; and, at least, as against the defendant the Western Union Telegraph Company, it is void, except in so far as it confers upon the plaintiff the right to maintain unmolested its telegraph line and conduct its business without interruption; which right is in no manner menaced by the proposed action of the defendants. The motion to vacate the restraining order is therefore granted.

NOTE.—The same doctrine here laid down, to wit, that a railroad company cannot give one telegraph company an exclusive license to occupy its right of way, was held in a series of cases which may be found in the INDEX to vol. 1 of this series, at page 868.

**THE DELAWARE, LACKAWANNA & WESTERN RAILROAD
COMPANY V. THE WILKESBARRE & WEST SIDE RAIL-
WAY COMPANY.**

Lucerne Co. (Pa.) Court of Common Pleas, Dec. 12, 1891.

(6 Kulp, 343.)

**ELECTRIC RAILWAY CROSSING STEAM RAILWAY.—CONSTITUTIONAL LAW.—
INJUNCTION.**

A statute permitting electric street railways to cross steam railroads at grade is not so clearly unconstitutional, in that it fails to provide for compensation to the company whose railroad is crossed, as to warrant a court in enjoining it from proceeding under proper regulations.

Certain regulations to govern such crossing prescribed, under statutory power of the court, the same not having been taken away by the statute above referred to.

Cases of this series cited in opinion: *Lockhart v. Craig Street Railway Co.*, vol. 3, p. 314; *Commonwealth v. Westchester*, vol. 3, p. 323; *Hellman v. Lebanon, &c., Ry. Co.*, ante, p. 152.

MOTION to continue preliminary injunction.

A. H. McClintock, for plaintiff.

Geo. R. Bedford, for defendant.

The opinion of the court was delivered by RICE, P. J.: In disposing of this motion we shall do no more than state our conclusions upon the questions of fact and law involved, which, briefly, are as follows:

The defendant is a street railway company existing under the provisions of the act of May 14, 1889, P. L. 211, the eighteenth section of which expressly authorizes such companies "to cross at grade, diagonally or transversely, any railroad operated by steam or otherwise now or hereafter built." In the construction of its road to Edwardsville and Plymouth it is necessary to cross the railroad of the plaintiff company at a point where the latter railroad intersects the street or road leading from the borough of Kingston to the boroughs aforesaid, and, although it is a danger-

ous crossing, there seems to be no reasonably practical mode whereby the defendant company can avoid crossing the plaintiff's railroad, at grade, at the point named. It is argued that the above section of the act of 1889 is unconstitutional, because it does not provide for making or securing compensation to the corporation whose railroad is crossed, but, following the case of *Lockhart v. Railway Company*, 139 Pa. 419, this is not so clear as to warrant the court in enjoining the defendant company from proceeding under proper regulations. See also *Com. ex rel. v. West Chester*, 9 Pa. C. C. R. 542; *Hellman v. Lebanon Railway Company*, 10 Pa. C. C. R. 241, and *Pennsylvania Railway Company v. Braddock Electric Railway Company*, C. P. of Allegheny county.

The eighteenth section of the act of May 14, 1889, is not inconsistent with and did not repeal that provision of the act of June 19, 1871, P. L. 1361, which gives courts of equity jurisdiction "to ascertain and define by their decree the mode of such crossing which will inflict the least practicable injury upon the rights of the company owning the road which is intended to be crossed," and taking into consideration all the circumstances we are of opinion that the regulations contained in the following order are reasonable and necessary for the protection of the rights of the plaintiff company and the public.

The preliminary injunction heretofore awarded is modified so as to permit the defendant company to construct and operate its electric railway across the tracks of the plaintiff company at grade at the point described in the plaintiff's bill, subject to the following regulations and conditions:

First. The defendant company shall elevate its electric wire at said crossing at least twenty feet and six inches above the level of the plaintiff's rails.

Second. In laying its rails the defendant company shall not cut the rails of the plaintiff company, or interfere with travel on said railroad, and shall, at all times, keep the crossing so constructed in good repair.

Third. The defendant company shall pay to the plaintiff company the difference between the value of the single arm gates at present in use at said crossing and the cost of double arm gates to take their place.

Fourth. Each car operated by the defendant company shall be brought to a full stop at said crossing, and shall not cross until signalled so to do by the conductor thereof, who shall first go ahead to said crossing and be on the lookout for approaching trains, cars and locomotives.

NOTE.—See note to *Saginaw Union St. Ry. v. Mich. Cent. Ry. Co.*, post.

PORT RICHMOND AND PROHIBITION PARK ELECTRIC RAILROAD COMPANY, Appellant, v. THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY, Respondent.

New York General Term, Second Dept., July, 1893.

(71 Hun, 179.)

ELECTRIC STREET RAILWAY CROSSING STEAM RAILWAY.—STATUTORY CONSTRUCTION.

Laws 1892, chapter 545, section 12, which provides that if the companies owning two intersecting railroads cannot agree as to the compensation, lines, grades, places and manner of intersection, commissioners shall be appointed to determine the same, applies to the crossing of a steam railroad by an electric street railway.

APPEAL from a judgment upon the dismissal of the complaint by the court.

Action for permanent injunction restraining a steam railroad company from interfering with an electric railway at an intersection, and to compel it to remove a gate, the appliances for operating which would interfere with the operation of plaintiff's road.

The trial court made, among others, the following findings of fact:

"I. The plaintiff is a domestic corporation duly organized

and existing under and by virtue of the laws of the State of New York, and is opening an electric surface railroad on a part of the shore road in the village of Port Richmond, New York.

"II. The defendant is a domestic corporation duly organized and existing under and by virtue of the laws of the State of New York, and for many years last past has been and is now operating a locomotive steam railroad, which passes through said village.

"III. The route of the plaintiff's railroad crosses the track of the defendant's railroad on the shore road in said village.

"IV. For a long time prior to the organization of the plaintiff and the construction of the plaintiff's railroad on the shore road, the defendant had been crossing the shore road on grade, and had protected its said crossing by a "Copeland" gate having four arms, two on each side of the tracks, operated by one crank, the four arms being connected by an endless chain, which crosses the shore road on each side of the tracks, fifteen feet eleven inches above the shore road when the gate is open.

"V. The plaintiff operates its railroad by means of a trolley overhead wire.

"VI. The plaintiff cannot string its trolley wire across the defendant's tracks and operate its cars across said tracks by the trolley system so long as defendant's 'Copeland' gate is in use. The stringing of said wire and the operation of the plaintiff's railroad by the trolley system are impossible unless the chain of said gate be broken, and the breaking of said chain renders said gate useless.

"VII. About the end of June, 1892, the plaintiff opened a negotiation with the defendant to obtain an agreement from the defendant giving it the right to string its wire and cross the defendant's tracks. While this negotiation was pending, and before the terms and conditions of crossing had been fixed, the plaintiff requested the defendant to disconnect the chain of its gate and permit the plaintiff's wire to be strung and its cars to be operated across the defendant's

tracks temporarily, pending the settlement of the terms and conditions of crossing. The defendant complied with said request in or about the month of June, and the plaintiff operated its cars across the defendant's tracks by the trolley overhead system, between about July 3 and November 27, 1892, under said temporary permission granted by the defendant. The defendant's gate during that period was useless in consequence of the breaking of the chain. After the plaintiff had strung its wires and had begun to operate its cars across the defendant's tracks, through the courtesy of the defendant, it broke off the said negotiation, and no agreement of any kind has ever been made between the parties to this action with reference to the terms and conditions of crossing.

"VIII. On November 27, 1892, the defendant again connected its gate chain, and since that time the plaintiff has been unable to operate its cars across the defendant's tracks by means of the trolley system.

"IX. No application has been made to the court by the plaintiff for the appointment of commissioners, as provided in section 12 of the Railroad Law."

The court found the following conclusions of law:

"I. That the defendant's gate was and is a lawful structure.

"II. That the plaintiff could not lawfully string its wires and operate its cars across the defendant's tracks without either agreeing with the defendant upon the terms and conditions of crossing or having the same fixed by commissioners appointed by the court, pursuant to section 12 of the Railroad Law.

"III. That the plaintiff obtained no permanent right of crossing the defendant's track by reason of the temporary permission to cross the same granted by the defendant in the latter part of June, 1892, and that the defendant's act in the reconnecting its gate chain in November, 1892, was proper and legal.

"IV. That the plaintiff has made no case for the interference on its behalf of a court of equity.

"V. That the complaint should be dismissed, with costs."

Section 12 of chapter 565 of the laws of 1892, the General Railroad Law, provides as follows :

"12. Every railroad corporation whose road is or shall be intersected by any new railroad, shall unite with the corporation owning such new road in forming the necessary intersections and connections, and grant the requisite facilities therefor ; and if the two corporations cannot agree upon the amount of compensation to be made therefor, or upon the line or lines, grade or grades, points or manner of such intersections and connections, the same shall be ascertained and determined by commissioners, one of whom must be a practical civil engineer and surveyor, to be appointed by the court, and as provided by the Condemnation Law ; and such commissioners may determine whether the crossing or crossings of any railroad before constructed shall be beneath, at or above the existing grade of such railroad, and upon the route designated upon the map of the corporation seeking the crossing, or otherwise."

Alexander S. Bacon, for the appellant.

Tracy, Boardman & Platt, for the respondent.

PRATT, J.: We think the seventh finding of fact is sustained by the evidence. From that it follows that no agreement was reached between the companies as to the crossing.

If plaintiff cannot make a satisfactory agreement it must apply under the Railroad Act, which we believe to be applicable.

The judgment must be affirmed, with costs.

BARNARD, P. J., concurred ; DYKMAN, J., not sitting.
Judgment affirmed, with costs.

NOTE.— See note to next case.

SAGINAW UNION STREET RAILWAY V. THE MICHIGAN
CENTRAL RAILROAD COMPANY.

Michigan Supreme Court, May 20, 1892.

(91 Mich. 657.)

ELECTRIC STREET RAILWAY CROSSING STEAM RAILWAY.—CUTTING WIRES.

While an electric street railway has no right to string its wires across a steam railroad track at such height as to interfere with the proper operation of the latter; and the steam railway company would in case of neglect or refusal of the street railway company to place its wires at the proper height, have a right to raise or remove the same; still this must be done with due regard to the business of the street railway company and so as to do as little harm as possible.

Accordingly, held, that to cut such wires when the line was in full operation, in the daytime, although there were several hours in each night when the wires might have been removed or raised without injury to the business or property of the street railway company, was trespass *ab initio*, for which the steam railroad company became liable for all damages caused to the street railway company.

It was also held that the State railroad commissioner, under whose directions the defendant acted, had no right to fix an arbitrary height at which electric wires must be maintained at steam railroad crossings, in the absence of any showing that a less height was insufficient to prevent danger to the employees of the railroad.

APPEAL by the defendant below from a judgment of Circuit Court, Saginaw county. Action for damages for trespass. Facts stated in opinion.

Hanchett, Stark & Hanchett (Ashley Pond, of counsel),
for appellant.

L. T. Durand (O. F. Wisner, of counsel), for plaintiff.

MORSE, C. J.: The Michigan Central Railroad Company operates the road across Genesee and Washington streets,

in the city of Saginaw, upon the track of the Detroit & Bay City Railroad Company, which latter company has had the right of way across these streets by grant from the city of East Saginaw since the year 1878. The Saginaw Union Street Railway, then operating its road by horse-power, in December, 1889, changed its operating power to electricity, by permission of the city granted by ordinance. It saw fit to use the trolley system. It placed the trolley wires across the defendant's tracks on Genesee and Washington streets. At Genesee street the overhead wire was placed 19 feet 9 1-2 inches above the defendant's track rails; at Washington street, 19 feet 6 inches above such rails. On the 16th day of May, 1890, while the plaintiff was in the full operation of its road and running its street cars, the defendant company cut the wires of plaintiff where they crossed its tracks on Genesee and Washington streets. For this act the plaintiff brought this suit in trespass, and recovered a verdict and judgment for \$933.03.

The defense to this action was, in substance, that in operating the defendant company's road it was necessary to pass under these wires cars from 12 feet to 14 feet and 3 inches in height from the tracks, and cars loaded with lumber to the height of 15 feet; that it was necessary to have brakemen standing upon the top of these cars to signal the engineer and for other purposes, and that, under these necessities, the wires of plaintiff were not placed at a sufficient height from the ground so that defendant's railway could be operated in the usual manner, with safety to its employes; that February 11, 1890, John T. Rich, then State Railroad Commissioner, issued an order to the general managers and superintendents of Michigan railroads, instructing them not to permit the erection or maintenance of the wires of electric street railways at a less distance above their tracks than is allowed for bridges and other obstructions not suitably guarded, and that this distance should not be less than 24 feet above the track. April 12, 1890, W. A. Vaughn, division superintendent of defendant, notified the plaintiff, by letter, that its wires were less than 24 feet

above defendant's tracks, and of the railroad commissioner's order, and asked plaintiff company to comply with such order. April 15, 1890, the president of plaintiff company replied to this letter that it was its intention to have its wires 22 feet 6 inches above the track at steam railway crossings, being advised that such height was sufficient, and was the standard for highway bridges. This letter Mr. Ledyard, president of the defendant company, answered by letter of May 3, 1890, stating that such company would not permit the wires of plaintiff to be strung across its tracks at the height of 22 feet 6 inches, and further wrote: "I am constrained to advise you that if by May 15, 1890, the wires of your company, where they may cross the right of way of this company, or any of its leased lines, are not placed at the height of 24 feet, this company will proceed to remove the same from the right of way."

Nothing further being done by the plaintiff company, the defendant cut the wires of plaintiff at these two street crossings about 4 o'clock P. M., May 15, 1890.

The circuit judge instructed the jury as follows, after stating the circumstances of the case, and the claims of the respective parties: "*Gentlemen of the jury*: It appears from the testimony in this case that the wires of the plaintiff were cut at four o'clock in the afternoon, during a busy hour, when the plaintiff's road was in full operation, when all the dynamos were at work, when the cars were all running, in broad daylight, and while people were traveling to and fro. It appears that the effect of the cutting was to stop all the cars throughout the city at the very point where they were at the time the cutting occurred. There was no further current, no further motion, no further power, on any of the cars. This interfered with public travel and business; it interfered with the general public; it was a stoppage of the entire business of the road, and the transportation of passengers at that time; it left every man upon every car right at the point where he was when the wire was cut, to go as best he might to his destination. The effect of the cutting at that time, as disclosed

by the testimony, was to injure the machinery, create what is known, in electrical terms, as a 'short circuit.' It also appears from the testimony in the case that in cutting the wire, unless some person stood there to protect people on the street, there might possibly be danger even from the wire that had been cut."

The charge of the court is: "That if the plaintiff neglected or refused to place its wires at a certain height over the defendant's track, so as to enable it to carry on its business in a proper way, the way that it had a right to carry it on, the defendant would have a right to raise the wires to the proper height, or remove the wires from its right of way; but in doing this the defendant was required to choose such a time and under such circumstances as would do no damage to the property of the plaintiff, nor damage to the general traffic of what is really a public institution; and the defendant was bound to inquire and ascertain whether attempting to remove the wires at that time and under such circumstances would have any such tendency. The railroad company was bound to inform themselves of that fact before they attempted to abate what they considered a nuisance to the operation of their road. I therefore charge you, as a matter of law, that the cutting of the wires at the time they were cut, and, under the circumstances, the attempt to remove them at the time, was unauthorized, and was a trespass, and that the defendants are liable for all the damage that resulted therefrom. The testimony shows that this road ran its last car at 11:30 at night; that the first car started at 5:30 in the morning; that there was a period of time within the 24 hours within which this wire might have been raised, even if it required cutting to raise it, that the defendant might have used in removing it from its track, when the business of the general public would not be interrupted. Further in this line, in the view of the court, the passage of these street cars over the street is subject to all the other uses of the street. When the street car track is not in use, people have a right to drive over it, walk over it, and use it. The stoppage of these

cars at that time of day created an obstruction in every street where the car stopped. It was there an obstruction to the general public travel. We cannot hold that anyone has a right to take the law into his own hands under such circumstances as it appears existed at four o'clock on the day of the 16th of May."

Fault is found with the language of this instruction that the defendant was required to choose such a time and under such circumstances as would do *no damage* to the property of the plaintiff, nor damage to the general traffic of what is really a public institution; that all that could be required of the defendant was that it should do no unnecessary damage, as the cutting of the wires alone would be some damage. Included in plaintiff's bill was \$41.20 for material and labor "in splicing wire," which was allowed by the jury. All the other items were for losses incurred by the unnecessary damage.

We are satisfied that the evidence shows that there was ample time, while the motive power of the plaintiff was at rest, and when its cars were not running, to have removed these wires. The removal of them was done at a time when it involved great loss to plaintiff and great danger to human life. Under the circumstances, the defendant company was a trespasser *ab initio*, and liable for all damages. It was shown that no bridge on the defendant company's line was higher than 22 feet, and that the Railroad Commissioner had sanctioned and consented to the wires of other street railway companies, at West Bay City and Lansing, being maintained at a height of 22 feet 6 inches. The defendant company refused to permit the plaintiff to string its wires at this height.

The Commissioner of Railroads had no arbitrary power to fix 24 feet as the height at which such wires must be maintained, in the absence of any showing that a less height was insufficient to prevent any danger to the employes of the railroads. The refusal of the defendant company to permit plaintiff's wires to be raised to 22 feet 6 inches—and the testimony shows they could have been

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so raised without cutting the wires or destroying property—and its choosing of the time to cut such wires when the plaintiff company was in full operation of its 16 miles of road in the city of Saginaw, was such a violation of the plaintiff's rights as cannot be excused, and justifies the recovery of all damages suffered by the plaintiff on account thereof.

It is also claimed that the public, or the rights of the public, are of no concern in this suit. This may be true, but what the court said as to the rights of the public has also no concern here, as it could have had no possible effect upon the jury. The court, in substance, correctly told them that, under the admitted facts in the case, the defendant was liable for all the damages to the plaintiff caused by the cutting of these wires; and what he said about the public and the rights of travelers was but surplusage, which could have done no harm to defendant. The jury gave no damages on account of the public, but simply allowed to plaintiff its items of damages as claimed.

The claim is made that the court was in error in his instructions to the jury as to the recovery of damages for the cost of a new armature to use in dynamo No. 2. The testimony tended to show that this armature was injured by the cutting of the wires, and that it was attempted to cure such injury by repairs, which amounted to \$78.80, but that it did not work well after such repairs, and finally a new armature was purchased, at a cost of \$375. The defendant upon the trial objected to any recovery on account of damages to this armature, claiming there was no testimony tending to show that it was injured by its acts of cutting the wires. The circuit judge charged that if the evidence showed that the repairs did not place No. 2 dynamo in as good condition as it was at the time of the cutting, and it became necessary to supply it with an altogether new armature, plaintiff would be entitled to damages for the cost of such armature, but would not be entitled to charge for the repairs; and that if the armature by the repairs was made as good as it was before the injury, then plaintiff could only recover for such

repairs. It is now contended that there was evidence tending to show that this new armature was more expensive than the old one, and of more value, and that plaintiff was only entitled as damages to the value of the old armature as it was before injury, less what it is now worth. The jury did not allow the repairs, but gave the plaintiff damages for the full cost of the new armature. The evidence shows that an armature lasts 10 or 15 years, if not injured by some accident. There was no testimony tending to show that this armature taken out of dynamo No. 2 was worth anything for other purposes or for any use connected with the dynamo; nor any attempt on the part of the defendant on the trial to show that it had any value outside of its use in the dynamo, and there was testimony tending to show it could not be used there. One witness testified that the new armature was a little more expensive than the old one, but the president of the plaintiff company testified that it was not. The defendant upon the trial was content with the denial that armature No. 2 was injured at all by the cutting of the wires, and made no attempt to ascertain the value of the old armature, or how much more costly, if any, the new armature was than the old one. Under these circumstances, we do not think a new trial should be granted because of this claimed excess in damages. The record fails to show that the plaintiff recovered any greater sum than it was entitled to on account of this injury to the armature in dynamo No. 2.

The judgment will be affirmed, with costs.

The other justices concurred.

NOTE.—In *Penna. R. R. Co. v. Braddock Elec. Ry. Co.*, Pa. Sup. Ct. 1893 (152 Pa. 116), held that the right of street railways to cross steam railroads at grade, under act of May 14, 1889, is subject to power of court, conferred by act of June 19, 1871, to regulate grade crossings and prevent them when readily practicable. Injunction made permanent, restraining electric railway from crossing steam railway at grade; it appearing to be a very dangerous crossing, that it would interfere with plaintiff's signal system, and that an overhead crossing could be made at a street not far away, at comparatively small cost.

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In *Pa. R. R. Co. v. Suburban Rapid Trans. Co.*, Allegheny Co. (Pa.) Com. Pleas., No. 1, April 27, 1893 (1 Pa. Dist. Rep. 686), the court assumed that the defendant, an electric street railway, had under the law a right to cross plaintiff's tracks, and decided that the only power of the court was to require the defendant to adopt such regulations as to the structure of its road and the general management of the cars which might be run over it at the point of crossing, as might seem most likely to afford the greatest protection to the public.

There is an obvious clashing of interests at crossings of steam railroads by electric trolley lines, which, unless very carefully provided against by legislation, must prove fruitful source of trouble in the courts.

The three foregoing cases, together with the two of which an abstract is given at the beginning of this note, relate to that subject.

CONSOLIDATED ELECTRIC LIGHT CO. v. PEOPLE'S ELECTRIC LIGHT & GAS CO.

Alabama Supreme Court, Jan. 14, 1898.

(94 Ala. 372.)

ELECTRIC LIGHT COMPANIES. — MUNICIPAL CONTROL. — INTERFERENCE. — INJUNCTION.

The authorization and supervision of electrical appliances in streets are matters for municipal regulation.

A company which, with municipal authority, first occupies a reasonably sufficient space for its electrical appliances, thereby acquires the right not to be molested in its possession.

A complaint in an action by one electric light company for an injunction restraining another company from erecting its poles and stringing its wires along the same streets and among those of the complainant, contained the allegations that such proposed construction would cause the complainant irreparable injury, would continually interfere with its business, would burn out its electrical apparatus, and would greatly endanger the lives of its servants.

Held, that an answer which merely denied that such results would arise "with a reasonably prudent management of complainant's system of wires" was not sufficient to authorize the dissolution of a temporary injunction.

Cases of this series cited in opinion: *Nebraska Teleph. Co. v. York Gas & Elec. Lt. Co.*, vol. 3, p. 364; *Grand Rapids Elec. Lt. Co. v. Grand Rapids Edison, &c. Co.*, vol. 2, p. 152.

APPEAL by the complainant from a decree of the Chancery Court, Jefferson county, dissolving a temporary injunction restraining the defendant from placing its wires among those of the complainant.

R. H. Pearson and Jas. H. Little, for appellant.

W. D. Bulger, contra.

STONE, C. J. : This case brings before us a subject which, in some of its bearings, is comparatively new in jurisprudence. It is the utilization of electricity, alike as a mechanical force, and as an illuminator. This use being relatively new, and probably not perfected in its adaptations, it behooves us to take our steps cautiously—very cautiously—lest our rulings may sanction or encourage conduct which would lead to great destruction of property, if not of life itself. And while we confess ourselves ignorant of the scientific principles on which this new discovery and use are based, it is common knowledge, in which we must be supposed to share, that very great skill and circumspection must be employed in directing and controlling its application. The world has learned that the electric current, when heavily charged, is so instantaneously destructive of life, [that it has, in some places, displaced the guillotine and the halter in the execution of criminals. All men know that, when it is sufficiently intensified to serve the purpose of illumination, or the propulsion of machinery, to come in touch with its charged apparatus is inevitable destruction.

The authorization and supervision of the apparatus necessary to each of the enterprises brought to view in the record before us, are certainly matters which pertain to the municipal government of the city of Birmingham. The privilege or franchise of each company to construct its plant and works within the city must have been first obtained ; for no prudent company or corporation would enter upon so expensive an enterprise, without such authority.

And the authority of the city government in the premises would not terminate with the grant of the franchise. It doubtless could, and would, assert its powers to prevent any and all abuse of the privilege. Vested rights, properly so called, are respected in judicial administration; but no one, under ordinary circumstances, can assert and maintain a vested right to the exclusive enjoyment of a public street. Monopolies are not favorites of the law, and if a street have sufficient width and capacity to admit of more than one public enterprise, without unduly obstructing it as a public highway, an exclusive right should not be granted to one company; and if granted, except under peculiar circumstances, it may, and should be, revoked.

In the case before us, it is averred, and not denied, that the Consolidated Electric Light Company — complainant below, and appellant here — first established its plant, and first occupied certain streets with its poles and wires. The attempt of the defendant company to establish its service along the same streets gave rise to this suit. It is certainly true, that the company which, with authority, first occupies a reasonably sufficient space for its works, along a street border, thereby acquires the right not to be molested in its possession. It can not, however, claim more space than is reasonably sufficient for the safe and successful operation of its works. *Nebraska Tel. Co. v. York Gas & Elec. Light Co.*, 43 N. W. Rep. 126 (43 Amer. & Eng. R. R. Cases, 234); *Grand Rapids E. L. & P. Co. v. Grand Rapids E. E. L. & F. G. Co.*, 33 Fed. Rep. 659.

It is averred in the bill that the defendant company "is now erecting poles along the streets and alleys named in paragraph 4th [those in which complainant was maintaining poles and wires], which extend into the space occupied by orator's wires and conductors, and between said wires and conductors, and that it is now preparing to place, and will immediately place, its wires and conductors, unless restrained therefrom by your honor, which are to be used in a business similar to your orator's, and to be charged with electrical currents the same as orator's, on the top of

said poles in and among orator's wires, and within orator's right of way, as hereinbefore described, in such manner as will continually interfere with orator's business, and cause orator irreparable injury, and burn out orator's electrical apparatus, and so deteriorate orator's light and power service, and so prevent orator from supplying its customers and lighting the streets of said city, as to become a public nuisance, and will destroy orator's business; and that it will, if permitted by your honor, greatly endanger the lives of orator's servants, and cause such constant and irreparable injury to your orator that it ought not to be permitted."

The answer of the defendant does not deny the acts and intentions done and entertained by it, as charged in the foregoing extract, but denies the danger that would ensue, "with a reasonably prudent management of complainant's system of wires." Its exact language is: "Respondents deny that the character of electrical currents is such, that another wire or system of wires, placed in closer proximity would give more frequent contact with orator's wire, and irreparably injure them by deteriorating orator's light and power service, or that it would destroy complainant's business, but aver that, with a reasonably prudent management of complainant's system of wires in said city, another system of wires might be operated along all of the said alleys, streets and avenues in said city, with the greatest security to both complainant and respondent. * * * Further answering said section, respondents say that, by the erection of respondent's system, and the observance of care on the part of complainants in the tightening of their wires, and the management of their business with a view of serving their business, rather than obstructing respondent's business, the danger to its employes (would) be greatly reduced, rather than increased, by respondent's system they are now proposing to erect, and there would be no difficulty for the servants of complainant to observe the wires, and to avoid contact therewith."

We think applied electricity has been long enough

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employed, and its uses and dangers sufficiently ascertained, to authorize the statement of certain propositions as falling within the purview of common knowledge. Among them, may we not state the following: (1.) Contact with electrical conductors, sufficiently charged to subserve the purposes of city illumination, destroys animal life. (2.) To properly regulate the apparatus for distributing electric light, requires that the employes or servants shall ascend the poles and go among the wires. (3.) Two sets of wires occupying the same space, and charged from different dynamos located apart, and controlled by separate and independent engineers, could not fail to be dangerous in many ways.

We cite the following authorities, which shed light on the questions we have been discussing: Thompson's Law of Electricity, §§ 43, 92, 93; *Teachout v. Des Moines Broad Gauge St. R. Co.*; 33 Amer. & Eng. R. R. Cas. 108; *N. O. Gas Light Co. v. Hart*, 4 So. Rep. 215; *Nebraska Tel. Co. v. York Gas & E. L. Co.*, 43 N. W. Rep. 126.

We do not think the specific allegations in the complainant's bill, setting forth interference, actual and threatened, with its previously established rights, have been sufficiently answered and negatived by the defendants. Giving to the answer a fair interpretation, and not taking its affirmative allegations into account, we think very great danger and loss would likely ensue to complainant's employes and its property if defendant be allowed to proceed with its work as projected. We therefore hold that the chancellor erred in dissolving the injunction on the denials in the answer.

We do not feel authorized to presume the city did or would grant to one company the right to occupy all the available space of its streets, unless such monopoly is shown to have been a necessary condition of obtaining the service. We will not discuss this question in detail at this time. Monopolies, as we have said, are not favored, and are never sanctioned unless a necessity for their tolerance is shown, or unless that necessity springs out of the very circumstances of the case, or the transaction.

Many affirmative averments are set up in the answer,

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which, if true, call loudly for redress. It is charged that complainant is claiming and occupying much more space than is necessary for the amount of service it renders. This is accomplished, it is charged, in various ways ; by sometimes occupying both sides of streets ; by crossing streets from side to side, by maintaining dead wires, etc. All this is done, it is charged, to maintain its monopoly and to keep down competition. If these charges are true, they show great public wrongs, which call loudly for municipal interference and correction. They would not authorize a rival company to attempt their redress, by measures which would probably lead to a destruction of property, and of life itself. The conservation of public security is of infinitely more importance than the success of either of the contending enterprises.

As we have said, we think the denials in the answer are not sufficient to authorize the dissolution of the injunction.

The decretal order of the chancellor is reversed, and the injunction reinstated.

Reversed and remanded.

NOTE.— See note to *State, ex rel. Wisconsin Teleph. Co. v. Janesville St. Ry. Co.*, *post*.

**RUTLAND ELECTRIC LIGHT COMPANY v. MARBLE CITY
ELECTRIC LIGHT COMPANY.***Vermont Supreme Court, 1893.*

(65 Vt. 377.)

USE OF STREETS.—INTERFERENCE.—INJUNCTION.

A municipal corporation, having contracted with an electric light company for lighting its streets, and the company in reliance thereon having expended money and erected its poles and strung its wires with the consent and under the direction of the municipal authorities, cannot infringe the rights which the company have thus acquired, or permit another company to infringe them.

Although said company first in occupation does not obtain an exclusive right to maintain its line in a street, yet the rights of a subsequent licensee are subordinate and must be exercised in such a manner as not to interfere with the rights of the other company.

Accordingly, held, that the earlier company, complainant, was entitled to an injunction perpetually restraining the later one, defendant, from so maintaining its appliances as to interfere by induction with the line of the complainant, to endanger the lives of its employes, and otherwise to interfere with the proper and safe operation of the complainant's system.

Case of this series cited in opinion: *State, Hudson Teleph. Co., Proc. v. Jersey City*, vol. 2, p. 132.

BILL in chancery, Rutland county. Heard upon the pleadings and a master's report. TAFT, Chancellor, dismissed the bill *pro forma*. The orator appeals. Facts stated in opinion.

George E. Lawrence and C. H. Joyce, for the orator.

J. C. Baker, for the defendant.

TYLER, J. : The orator and defendant are rival corporations organized under the general laws of the State for the

purpose of carrying on, respectively, the business of electric lighting in the village of Rutland.

In May, 1886, the orator entered into a written contract with the trustees of the village for lighting the village streets, and acting upon and in compliance with that contract, it established a plant, erected poles, strung wires and commenced doing business. It was stipulated that where wires crossed streets they should not be within thirty feet of the ground and that line wires should be at least twenty feet above the ground. The poles were erected at points indicated by the trustees.

Some three years later the defendant, by permission of the trustees, erected poles, strung wires and commenced the business of electric lighting in competition with the orator. Its poles were also placed under direction of the trustees. In some of the principal streets the poles were set on the same side as the orator's poles and quite near to them. The orator employs a system for lighting buildings with incandescent lamps with a current of electricity used on its wires of only one hundred and ten volts, which is so low a current that the wires when charged can be handled with safety. The defendant uses for its incandescent lamps an alternating current of one thousand volts on its wires in the streets. By means of what are called converters a current of fifty volts is taken into buildings.

When the defendant's wires were first strung upon the poles they did not touch the wires and poles of the orator, but from the effect of storms, from stretching or some other cause, they sometimes come in contact with the orator's poles and wires and injure them. The wires should not be nearer each other than twelve inches, and the cross pieces upon which they are strung should be at least two feet apart, so that when the wires are loaded with snow and ice, or when swayed by the wind, they will not come in contact. When a wire carrying a heavy current comes in contact with one carrying a lighter current, the heavy current is

liable to be inducted into the other wire, which endangers the orator's wires, lamps and plant, and is liable to set fire to buildings, for which the orator would be answerable in damages.

The defendant's poles are not as high as those of the orator; the cross pieces to which its wires are attached are nearer the ground than those of the orator, so that in places the defendant's wires are under the orator's, which renders it difficult and dangerous for the orator's employees to reach their wires for repairs and other purposes. No accident has thus far happened. The defendant's wires are not usually charged with electricity in the day time, but the two plants are entirely independent of each other and the orator's employees have no means of knowing when the defendant's wires are charged.

Where the wires of the parties cross Centre street, the orator's is only twenty-one feet above the ground; the defendant's is strung above it, and having sagged, rests upon it. At other places where the respective wires enter buildings they interfere with each other. These are the material facts found by the master. It is conceded that the village trustees had authority to make the contract with the orator.

The defendant virtually concedes that the orator's contract with the trustees is the measure of its rights. The village, by its trustees, invested the orator with certain rights, and after the orator, relying upon the contract, had expended money in establishing its plant and appliances, the village could not by an ordinance have infringed these rights, and clearly it could not confer upon the defendant authority to infringe them.

On the other hand, it is not claimed that the orator obtained a privilege of the streets to the exclusion of the defendant, but that the defendant's rights were subordinate to the orator's and must be exercised in such a manner as not to interfere with them. If authorities were required to sus-

tain so plain a proposition, those cited upon the orator's brief are pertinent.

In *Hudson Tel. Co. v. Jersey City*, 49 N. J. L. 303, it was held that where the city, by an ordinance, under statutory authority, had designated certain public streets in which the company might place its telegraph poles, and the company had expended money in placing its poles upon such streets, the city could not, by subsequent ordinances, revoke such designation; that the company had an irrevocable vested right to use the streets for the designated purposes.

Thompson's Law of Electricity lays down the general rule that when a municipal corporation, under a statutory provision, has, by ordinance or other lawful mode, authorized a telephone company to erect its posts or poles in certain designated streets, and the company proceeds so to erect them, and to expend money on the faith of the license so granted, it thereby acquires a vested right to the use of the designated streets so long as it conforms to the conditions of the license; and the license cannot thereafter be revoked by the municipality. So an ordinance authorizing a telephone company to maintain lines on its streets, without limitation as to time, for a stipulated consideration, when accepted and acted upon by the grantee, by a compliance with its conditions, becomes a contract which the city cannot abolish or alter without consent of the grantees.

It appears that the orator has suffered some damage in consequence of its wires coming in contact with the defendant's; that it is constantly exposed to danger from such contact, and that its men cannot conveniently, and without danger, reach its wires for the purpose of making repairs, and of connecting lines therewith to buildings. We therefore think that the orator is entitled to relief according to the prayer of the bill.

The pro forma decree dismissing the bill is reversed, and the cause remanded; an accounting is ordered for the damages already suffered by the orator, and the orator

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may have a perpetual injunction restraining the defendant from maintaining its wires so as to interfere with those of the orator.

NOTE.—See note to *State, ex rel. Wisconsin Teleph. Co. v. Janesville St. Ry. Co.*, *post*.

**CENTRAL PENNSYLVANIA TELEPHONE & SUPPLY COMPANY
V. WILKESBARRE AND WEST SIDE RAILWAY COMPANY.**

Luzerne County (Pa.) Common Pleas, Feb. 8, 1892.

(11 Pa. Co. Ct. R. 417.)

TELEPHONE AND ELECTRIC RAILWAY.—INTERFERENCE.—INJUNCTION.

“Telegraph” in a statute includes “telephone.”

Questions of the rights of each party to use the streets in question, left to be decided upon final hearing.

As to danger of actual contact of wires :

A street railway company is liable for injuries caused by negligent construction of its road ; and bound to place guard wires or other known safeguards against injuries to others.

Telephone company bound to place its wires at such height that they will not interfere with trolley wire (which has to be at least 20 feet 6 inches high and below all other wires), and so they will not be swayed by the wind and thus brought into contact. This is so both on common law principles and by a statute requiring telephone companies to so use the streets as not to incommode the public use for purposes of travel, which includes travel by electric railway.

If the telephone company can obviate the difficulty by using higher poles or by insulation, and the electric railway company cannot obviate it by use of reasonable care, the duty to change the construction of its line rests upon the telephone company.

If the dangers are due to original negligent construction of its line, the telephone company is not entitled to be indemnified for the cost of the necessary changes. If it was constructed with due care, with reference to the then existing uses of the highway, it is entitled to indemnity, the measure of the damages being the cost of the changes.

As to danger from induction and conduction :

Plaintiff claimed that it was impossible for it by any device to avoid such

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danger ; and further, that it was impossible to operate both telephone and electric railway in the streets in question ; and it claimed the superior right by reason of its prior occupancy. The court stated that this amounted to a claim of right to exclude the electric railway from said streets, a position which it could not probably sustain, though that question need not be here decided.

Continuance of preliminary injunction based upon these dangers denied, but granted as to dangers from actual contact, with leave to defendant to move to dissolve the injunction, upon proof that it had adopted proper safe guards, and upon giving security for the indemnity of plaintiff.

Cases of this series cited in opinion : *Wisconsin Teleph. Co. v. Oshkosh*, vol. 1, p. 687 ; *Roberts v. Wisconsin Teleph. Co.*, vol. 3, p. 471 ; *Cumberland Teleph. & Tel. Co. v. United Elec. Ry. Co.*, vol. 3, p. 408 ; *Chesapeake & Pot. Teleph. Co. v. Mackenzie*, vol. 3, p. 196 ; *Franklin v. N. W. Teleph. Co.*, vol. 2, p. 439 ; *Attorney-General v. Edison Teleph. Co.*, vol. 2, p. 440, note ; *Lockhart v. Craig St. Ry. Co.*, vol. 3, p. 814 ; *Commonwealth v. Westchester*, vol. 3, p. 326 ; *Taggart v. Newport St. Ry. Co.*, vol. 3, p. 306 ; *Halsey v. Rapid Transit St. Ry. Co.*, vol. 3, p. 283 ; *Mt. Adams, &c. Ry. Co. v. Winslow*, vol. 2, p. 263 ; *Pelton v. East Cleveland Ry. Co.*, vol. 2, p. 215 ; *Cincinnati Inclined Ry. Co. v. City & Sub. Tel. Assn.*, vol. 3, p. 443 ; *Hudson River Teleph. Co. v. Watervliet, &c. Co.*, post. ; *D. L. & W. R. R. Co. v. Wilkesbarre, &c. Co.*, post.

MOTION to continue preliminary injunction.

Dickson, Oondor and Munson, for plaintiff.

Fuller & Bedford, contra.

RICE, P. J.—The questions to be decided on this motion may be considered under the following general heads :

I. The authority of the plaintiff to maintain and operate a telephone line on the highways described in the bill.

II. The authority of the defendant to construct, maintain and operate an electric railway on the single trolley plan in the same highways.

III. The injury and damage to the plaintiff resulting from actual contact of the defendant's wires and poles with the wires and poles of the plaintiff, likely to be caused by the operation of the defendant's railway as now constructed.

IV. The injury and damage to the plaintiff, resulting from induction and conduction, even though actual contact is sufficiently guarded against, which would be caused by

operating the defendant's railway in the manner proposed.

I. The authority of the plaintiff to maintain and operate a telephone line on the highways described in the bill.

The plaintiff was incorporated in Sept., 1880, under § 33 (Telegraphs) of the act of 1874, as amended by the act of May 1, 1876, P. L. 90.

It is argued that it is not a telegraph company within the meaning of these acts. A telephone is now regarded as a new species of telegraph (Thompson on Electricity, § 101); hence it has been held that a statute applicable to the incorporation of telegraph companies may be deemed to apply to telephone companies, although the latter are not named. *Wis. Tel. Co. v. Oshkosh*, 62 Wis. 32; *Roberts v. Wis. Tel. Co.*, 46 N. W. 800. Under a statutory power to construct and operate telegraphs, a company may establish a telephone service. *Cumberland Tel. Co. v. United Electric Railway Co.*, 42 Fed. Rep. 273; *Chesapeake, etc., Tel. Co. v. B. & O. Teleg. Co.*, 66 Md. 399. A provision of the Code of Iowa, authorizing suits to be brought against telegraph companies in any county through which their lines pass, was held to apply to telephone companies; *Franklin v. N. W. Tel. Co.*, 69 Iowa, 97. In an English case it was held that a telephone line, operated under the Edison telephone patents, was a telegraph line, and that the communications sent over it were telegrams within the meaning of the act of 1869, conferring exclusive telegraph privileges upon the postmaster-general. *Att'y-Genl v. Ed. Tel. Co.*, L. R., 6 Q. B. Div. 244. In a very thoroughly considered case, Judge SIMONTON held that a telephone company incorporated under the act of 1874, and its supplement of 1876, is a telegraph company within the meaning of the Revenue Act of 1879, and is liable to the tax there provided for telegraph companies. *Com. v. Penna. Tel. Co.*, 42 Leg. Int. 180. To the same effect of the last case is *Tel. Co. v. Board of Equalization*, 67 Iowa, 250. We have no doubt, therefore, that the acts referred to authorize the incorporation of the plaintiff company.

But the act of 1876 provides that before the exercise of

any of the powers conferred thereby, permission to erect poles and run wires in or over any of the streets shall be obtained from the municipal authorities. It is alleged that such permission has not been granted to the plaintiff by the city of Wilkesbarre and the borough of Kingston. This allegation was denied during the course of the oral argument, and therefore we do not feel at liberty at this time to declare that the plaintiff company has not the authority to occupy the highways in said municipalities. But, if the fact be as alleged by the defendant, we do not see how the plaintiff can claim any superior rights in the streets of those municipalities by reason of their prior occupation. Of course we do not mean by this to imply that the defendant company would have a right to wantonly or negligently destroy or interfere with the property of the plaintiff, but if, as the plaintiff claims, it is impossible for both companies to operate on the same street, that company must give way which is using the street without authority of law.

II. The authority of the defendant to construct and operate an electric railway, on the single trolley plan, on the highways in question.

The defendant was incorporated under the act of May 23, 1878, P. L. 111. In its original application the route of its railway was designated as being about six miles in length, and extending from and in the city of Wilkesbarre, across the Susquehanna river, through the township of Kingston, and through the borough of Kingston, to and into the boroughs of Forty Fort, Luzerne and Edwardsville. It obtained the benefits of the provisions of the act of May 14, 1839, P. L. 211, by acceptance thereof in the method prescribed in the 20th section of the act, and has constructed an extension from Forty Fort to the borough of Wyoming under the authority conferred by section 4 of the act of 1889. It is alleged, and not denied, that it has obtained the consent of the authorities of the several municipalities through which the railway passes. The bill contains the general allegation that the defendant has no

authority of law to construct, maintain and operate an electric railway upon the roads and avenues described in the bill. On the argument the counsel explained this averment to mean that the defendant's railway does "not have a continuous route from the beginning to the end, forming a complete circuit with its own track," as required by section 15 of the act of 1889. We are of opinion that this section of the act was not intended to require that the route of a railway between two points shall be a circuitous one, but only that it shall be a continuous one; in other words, that the cars may go and return between the two termini over the same street and track. What the section intended to prevent was the incorporation of a company for the construction of railways branching off to different points, like spokes of a wheel, without connecting these different termini. Each of said railways may have a continuous route from the beginning to the end, but they are, in fact, separate and distinct railways over several distinct and unconnected routes. As, at present constructed, it would seem that the defendants' railway is subject to this objection. After reaching Wyoming avenue, in the borough of Kingston, it branches off in one direction to the borough of Luzerne, and thence by an extension to the borough of Wyoming, and in another direction to the borough of Edwardsville. These termini are not at present connected. In answer to this objection, it was stated on the argument that the defendant's railway is not completed, and that, when completed, the main line will form a continuous route from the beginning to the end, within the meaning of the act of 1889. No affidavits as to this point have been submitted to us on either side, and we do not feel at liberty to decide so grave a question upon the proofs now before us. We therefore leave it, like the first question, to be decided upon final hearing.

III. The injury and damage to the plaintiff, resulting from actual contact of the defendant's poles and wires with the wires and poles of the plaintiff.

The results likely to follow from actual contact are thus enumerated and described in the affidavit of H. W. Rhoads, president of the plaintiff company :

(a.) That all telephone instruments that may at the time of such contact be connected with said wires would be burned out.

(b.) That the switch-board at the exchange, an expensive, valuable and necessary equipment of the telephone service, would be in constant danger of being burned.

(c.) That if the powerful current from the railway company's wire should burn off the wire of the telephone company and cause the latter to drop to the ground without breaking the contact above, the lives of persons passing in that vicinity would be imperiled.

(d.) That if the powerful current from the railway company's wire should be carried into the telephone exchange over the telephone wires, the lives of the persons in proximity to the switch-board would be jeopardized.

(e.) That there would be constant danger of the destruction by fire of the building wherein the telephone exchange is located, as well as other buildings which might at the time be connected by a telephone wire with the ones so in contact.

On the part of the defendant it is alleged (1) that a continuous electric current of five hundred volts, which it does not propose to exceed, is not fatal to human life ; (2) that the placing of guard-wires wherever the wires of the plaintiff and the trolley wire of the defendant are in close proximity will effectually prevent contact between said wires and avoid danger to the property of the plaintiff and the lives of its employes ; (3) that the line of the plaintiff is negligently constructed, in that its wires are unnecessarily allowed to sag in many places, in that many of its poles do not exceed fifteen feet in height, and are small, and lean towards the street, and in that in the construction of its line upon Wyoming avenue the plaintiff has unnecessarily crossed and recrossed said avenue with its wires at very short intervals.

It will be observed that the defendant does not deny that, as at present constructed, there is or is likely to be actual contact, nor that such actual contact is likely to cause serious injury to persons and property. It could hardly be denied, even in an *ex parte* affidavit, that many of the consequences described by Mr. Rhoads will be likely to ensue even though an electric current not exceeding five hundred volts may not be absolutely fatal to human life. Conceding that the defendant company has the unqualified right to use these highways for its track, poles and wires, and that incidental inconvenience and loss which may ensue to others from the operation of its railway are *dammum absque injuria*, it cannot be contended that it is not liable for injuries caused by the negligent construction of its railway, nor that a court of equity has not power to enjoin them if these injuries will be substantial and continuing. If guard-wires will prevent contact, due care requires that they be placed by the defendant company before turning on its powerful electric current, or if the defendant can avoid this danger by the exercise of any other reasonable precaution, or the use of any other practical appliance known and recognized in the present condition of electric science as applied to the construction of railways, the omission to take such precaution would be negligence, and until this is done it is our duty to continue the present injunction.

But, from the very nature of an electric railway operated on the single trolley plan, the trolley wire must be a certain distance from the rails, and in the recent case of *D. L. & W. R. R. Co. v. West Side Railway Co.*, 6 Kulp, 342, it was alleged and not controverted, that it was not practicable to elevate it higher than twenty feet and six inches. We assume that a trolley wire must be under all other wires crossing the line of the railway. Suppose, then, that the telephone wire is stretched so near the trolley wire as to be in danger of contact when swayed to and fro by the wind, or so low that it is not reasonably practicable for the trolley wire to be suspended and operated under it, what are the rights and duties of the parties? We are of opinion

that a fair application of the principle, *sic u'tere tuo ut alienum non laedas*, would require the telephone company to adapt itself to the new condition of things even in the absence of any statutory regulation on the subject. See Thompson on Electricity, § 45, and cases cited. But there is such regulation which we think puts the question beyond controversy. Clause 1 of § 33 of the act of 1874, under which the plaintiff was incorporated, reads as follows: "Such corporations shall be authorized, when incorporated as hereinbefore provided, to construct lines of telegraph along and upon any of the public roads, streets, lands or highways, etc., by the erection of the necessary fixtures, including posts, poles, or abutments for sustaining the cords or wires on such line, but the same shall not be so constructed as to incommode the public use of such roads, streets or highways, or injuriously interrupt the navigation of said waters." This provision was intended to secure and protect the rights of the public in highways for purposes of travel and transportation, not only according to the modes in use at the time of the construction of the telephone line, but also according to any other mode which was presumably in contemplation when they were ordained and established. For example, if the defendant were about establishing an omnibus line on the streets in question under a charter power so to do, and the wires of the telephone company crossing the highway were so low as to interfere, this would not only incommode, but obstruct the public in a lawful use of the highway for the primary purpose for which it was established. And, in such a case, it cannot be doubted that it would be the duty of the telephone company to remove the obstruction, although it was not actually such at the time it was constructed. The great weight of authority is that the construction and operation of a horse railway upon a street is only a new mode of using it, and does not impose an additional servitude. Judge DILLON, after citing and discussing the numerous authorities on the question, concludes: "The author regards the appropriation, under legislative authority, of a reason-

able portion of a street for a horse railway constructed on the graduated surface of the street and used under municipal regulation in the ordinary mode, to be such a use as falls within the purpose for which streets are dedicated or acquired under the power of eminent domain. When thus authorized and so regulated by the public authorities as not to destroy the ordinary and usual street uses, this is a public use within the fair scope of the intention of the proprietor when he dedicates the street, or is paid for property to be used as a street. Such proprietor must be taken to contemplate all improved and more convenient modes of use which are reasonably consistent with the use of the street by ordinary vehicles and in the usual modes." 2 Dillon's Municipal Corporations, § 722.

The question as to the use of the streets by electric railways is comparatively new, but so far as it has been discussed by the courts, the same doctrine has generally been held applicable to them. See *Lockhart v. Railway Co.*, 139 Pa. 419; *Com. v. Westchester*, 9 Pa. C. C. R. 542; *Heilman v. Lebanon Ry. Co.*, 10 id. 241; *DuBois Traction Co. v. Buff. etc., Ry. Co.*, 10 id. 401; *D. L. & W. R. R. Co. v. W. B. etc., Ry. Co.*, 6 Kulp, 342; *Taggart v. Newport Ry. Co.*, 16 R. I. 668; *Halsey v. Rapid Transit Co.*, 47 N. J. Eq. 380; 20 Atl. Rep. 326; *Mount Adams, etc., Ry. Co. v. Winslow*, 3 Oh. Cir. Ct. Rep. 425; *Pelton v. East Cleveland R. R. Co.*, 22 Week. Bull. 67. The two latter citations are taken from 4 Harv. Law Rev. 258.

It may be said that electric railways were not known and therefore could not have been contemplated when these highways were laid out or dedicated; but this argument is not convincing, for the same is true of horse railways, at least so far as some of the highways are concerned. Judge COOLEY says: "When land is dedicated for a street, it is unquestionably appropriated for all the ordinary purposes of the street, not merely for the purposes for which such streets were formerly applied, but those demanded by new improvements and new wants." Cooley's Constitutional Limitations, 688.

An Ohio statute gave authority to a telephone company to construct its line from point to point along any public highway so that the "same shall not incommode the public." In a suit by the telephone company to enjoin an electric railway company, the court, after pointing out that the main purpose of streets and highways is to facilitate travel and transportation, and that new and improved agencies for effecting this purpose must be presumed to have been in contemplation in addition to those in existence when the ways were established, said: "The statutory permission to the telegraph association to construct its lines along and upon a highway was not, therefore, without qualification. But whether the Legislature had or had not imposed the condition that the public should not be incommoded, the association, in our judgment, acquired its privilege or permissive grant subject to the duty of so changing and adjusting, when necessary, its system of operating its telephone lines as not to curtail the enjoyment by the public of the best modes of travel and transportation upon the streets. Whether all who go upon streets shall have the most convenient and expeditious passage and carriage of persons and goods has not been made dependent upon the manner in which the defendant in error has preferred to locate its poles, stretch its telephone wires or form the electric circuit." *Cin. Inc. Plane Railway v. City and Suburban Tel. Association*, 44 Albany Law Jour. 86.

We summarize our conclusions upon this branch of the case as follows :

(a) An electric passenger railway company is bound to use reasonable care and prudence in placing its wires and poles, and to adopt all ordinary and usual appliances and methods to prevent contact between its trolley and feed wires and the wires of a telephone company stretched along or across the same highway. An electric railway company, failing to exercise this degree of care, may be restrained, by injunction, from operating its line until this defect in construction is remedied. It is conceded by the defendant that actual

contact between the wires of the plaintiff and defendant may, in most instances, be prevented by guard wires ; but, although the defendant expresses a willingness to place such wires, it does not appear that this precaution has as yet been taken ; therefore the injunction will be continued for the present, with leave to defendant to move to dissolve same upon proper proof.

(b.) It is the duty of a telephone company using a public highway for its poles and wires to so construct and maintain its line as not to incommode the public use of the highway for purposes of travel and transportation, whether by ordinary vehicles, horse railways or electric passenger railways lawfully used on the same. Hence if, as alleged by the defendant, the telephone company can avoid the dangers from actual contact of its wires with those of the electric railway by stretching them on higher poles, or by insulation, and the railway company cannot obviate them by the exercise of reasonable care and prudence in the construction of its road and necessary appliances, the duty to change the construction of its line rests on the telephone company, and this, too, notwithstanding its prior occupancy of the street.

(c.) In the case supposed in the latter proposition, if the dangers from contact are due to the negligent manner in which the telephone line was originally constructed, the telephone company is not entitled to be indemnified for the cost of making the necessary changes.

(d.) But, if the telephone line was constructed with due care, and with due regard to the rights of the public in the highways, as highways were commonly used at the time the telephone line was constructed, and if the plaintiff is entitled to indemnity, the measure of damages which it will sustain would be the cost of making the necessary changes.

IV. The injury and damage, even though actual contact is sufficiently guarded against, which will be caused by induction and conduction.

In describing the effects from these two causes we can

not do better than to quote from the opinion of ANDREWS, J., in the case of *Hudson River Tel. Co. v. Watervliet, etc.*, 121 N. Y. 393: "It appears with reasonable certainty from the complaint and affidavits used in the motion for the injunction, that the operation of the defendant's road by the single trolley system will result in serious disturbance of the telephone service. It is sufficient for the present purpose to state that this apprehended disturbance will arise in two ways: first, by the earth distribution of the current of electricity conveyed by the trolley wire suspended over the road of the defendant, and the attachment to the motor on the defendant's cars, and thence discharged on to the rails and tracks, which discharged current will in fact find its way through the earth to any neighboring conductors of electricity, including the wires used by the plaintiff for the earth or grounded circuit of the telephone system; and, second, by what is called induction, that is, by inducing on the telephone wire currents of electricity corresponding in variation with the variable currents used by the trolley wire. The effect of each of these causes, as appears by the testimony of the electrical experts, is to confuse and drown the minute current used in the telephone service, and prevent or greatly interfere with communication by telephone."

It is not made clear that these disturbances can be prevented by the defendant company. It was at one time thought that they might be prevented by the use of the double trolley, but the plaintiff's counsel conceded that this method is impracticable. In the case of *Cumberland Tel. Co. v. United Electric Railway Co.*, 46 Fed. Rep. 273, BROWN, J., now of the Supreme Court of the United States, thus sums up the results of experience and investigation on this subject: "But the fact that nine-tenths of the electric railways in this country are equipped with a single trolley, and that in most of the cities where the double trolley was formerly used, including Montgomery, Pittsburgh, Denver, Albany and Appleton, they have been abandoned, are strong arguments against their practica-

bility. Indeed, it is only where the roads make use of a double track that the double trolley can be made a success. Add to this that in numerous cases between the telephone companies and the electric railways, which have arisen in other States, the courts have uniformly held the double trolley to be a failure as applied to single tracks, and it would seem that the question could no longer be considered an open one."

Is it possible for the plaintiff to prevent these disturbances from induction and conduction? The defendant contends that it is. Mr. Fagan testifies: "First class telephone construction requires a metallic circuit, which, in this instance, would, on proper poles, put the matter beyond question. Conduction is liable to happen from the use of earth for a return circuit both by the telephone and the railway, which it is not feasible for the latter to avoid, but the telephone can, by a metallic circuit." To the same effect is the affidavit of J. C. Meixell.

In the case of *Hudson River Tel. Co. v. Watervliet, supra*, the court said: "The use of a grounded circuit is not necessary to a telephone system; the substitution of a metallic circuit, such as is used on long distance telephone lines, will, it is admitted, prevent any material disturbance from the operation of the defendant's road by the single trolley system. There is no dispute that the substitution by the plaintiff of the metallic for the earth circuit is practicable, but the change would involve a large outlay, and on the other hand the testimony of the experts is that, besides obviating the disturbance caused by the defendant's road, the change would promote the general efficiency of the telephone service."

In the case of *Cumberland Tel. Co. v. United Electric Railway Co.*, the court said it could not be doubted that the evil might be remedied by a return wire attached to each telephone; but this would be so expensive as not to be feasible in that case. It could be remedied, however, by the use of the McCluer device. In the case of *Cin. Ry. Co. v. City and Sub. Tel. Assn., supra*, the court stated that

it was admitted that the telephone disturbances might be remedied by constructing the telephone with a complete metallic circuit, or by resorting to what is known as the McCluer device, consisting of a single return wire to which a number of telephone wires are attached. We cite these decisions, not as conclusive adjudications of the question of fact raised in this case, but as showing the opinions entertained concerning them at the time the decisions were rendered. On the other hand, the plaintiff in this case has submitted affidavits to the effect that under the conditions existing on Wyoming avenue and the Plymouth road, the operation of the defendant's railway will cause absolute and irremediable destruction of the property and business of the telephone on said highway, which is not feasible and practicable to avoid by the construction, by the telephone company, of any other system, or the adoption of any plan or device practically used or known in electricity. The counsel went further, and conceded that it was commercially impossible to construct and operate a telephone line and an electric railway on these thoroughfares at the same time. The argument based on these premises is, that as the occupation of the highways by the telephone company was the lawful exercise of their franchises, and was prior in time, therefore their right is superior to that of the defendant. It would seem, logically, to follow that the telephone company has a right to exclude the railway company from these thoroughfares. This proposition "needs but to be stated to induce hesitation." We doubt it for the reason stated in our consideration of the question of injury arising from contact and the relative rights and duties of the two companies in that regard. True, the telephone company is lawfully using the highways, and was prior in time, but it is subject to the condition that it shall not incommode the public use of the same. If it not only incommodes, but absolutely excludes, the public use of the same for travel and transportation in a perfectly lawful mode, we doubt if the telephone company can say that it has a right to do so because

it is unavoidable ; much less that even if it were within its power to protect itself against the injury resulting from the operation of defendant's railway, it is not bound to do so. But it seems to us unnecessary to go into an extended discussion of this question at this time. The plaintiff claims an exclusive right to the use of electricity on this highway as against the defendant, and this claim is based on the allegation of fact that the operation of the defendant's railway must necessarily destroy its property and business, and that this injury cannot be avoided by adoption on their part of any practicable means. This essential fact is denied by the defendant, and upon the present state of the proof is in doubt. To issue an injunction in such case, after the railway has been constructed, and before final hearing, would be contrary to well-settled principles. We cite only one case in this connection. It is elementary law that in equity a decree is never of right as a judgment at law is, but of grace ; hence the chancellor will consider whether it would not do greater injury by enjoining them than would result from refusing. *Richard's Ap.*, 57 Pa. 105. Much more is this true of the disposition of a motion for a preliminary injunction, where the facts are disputed, and the defendant is willing to give security for such damages as it may be liable for.

The injunction heretofore awarded is continued until further order, with leave to the defendant to move to dissolve the same upon making proofs suggested in the foregoing opinion, and upon giving security in such sum as shall be directed by the court for the payment of all damages to the plaintiff which it may be adjudged liable for.

NOTE.—Subsequently, upon proof that the defendant had put up guard wires by which the dangers from actual contact were avoided, and upon the defendant filing a bond in the sum of \$10,000, conditioned to pay all damages for which it might be adjudged liable to the plaintiff, the injunction was dissolved.

See note to *State, ex rel. Wisconsin Teleph. Co. v. Janesville St. Ry. Co.*, post.

**HUDSON RIVER TELEPHONE COMPANY, Applt., v. WATER-
VLIET TURNPIKE AND RAILWAY COMPANY, Respt.**

New York Court of Appeals, October, 1892.

(185 N. Y. 393.)

**WIRES IN STREETS.—INTERFERENCE.—INJUNCTION.—STATUTORY CON-
STRUCTION.**

A statute authorizing a street railway company to operate its road by "any mechanical or other power," except steam, which it may choose to employ, is sufficiently broad to authorize the use of electricity, though that was not in use or invented at the time the statute was enacted.

A company thus clothed with discretion is not irrevocably bound by a choice of motive power once made. Nor are the municipal authorities, whose consent is made requisite by the statute, bound by conditions first imposed upon the company.

The use of the single trolley overhead system of electrical propulsion of street cars does not constitute a public nuisance. On the contrary, it is the best system yet in use. It was therefore proper for the defendant to adopt it, having obtained the requisite consent.

The street surface railroad act of 1884, which requires approval of railroad commissioners and consent of abutting owners to the construction or extension of a street railway, provides that it shall not affect previously acquired rights. Therefore it does not apply to a company which by an earlier statute had been invested with discretion to change its motive power.

A telephone company, though first in occupation of a street, has no equity prior to a street railway company, subject to whose rights it expressly obtained its franchise. The same would be true in any event, since the railway is and the telephone is not a primary street use.

A telephone company's franchise being subject to rights of public travel, and the use of the street by the railway being in aid of travel, the latter cannot be enjoined at suit of the former, upon the sole ground of injury due to induction, which the railway company could avoid only by the use of more expensive and dangerous and less useful apparatus.

Although the telephone company grounds its wires upon its own land or other private property under license from the owners, and the railway company generates and accumulates electricity in large and turbulent quantities and allows it to escape upon the plaintiff's premises, thus causing injury by conduction, and giving rise to query whether the

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principle *sic utere tuo ut alienum non laedas* might not be invoked ; still this will not avail the telephone company, since its use of grounded wires is part of its system of telephonic communication, its use of the streets for which is in its entirety subject to the lawful purposes of public travel.

It seems that telephone companies may be organized pursuant to a statute which provides for the incorporation of telegraph companies only.

Cases of this series cited with approval : *Wisconsin Teleph. Co. v. Oshkosh*, vol. 1, p. 687 ; *Cumberland Teleph. & Tel. Co. v. United Elec. Ry. Co.*, vol. 8, p. 408 ; *Attorney-General v. Edison Teleph. Co.*, vol. 2, p. 440, note.

APPEAL by defendant from order of General Term of the Supreme Court, Third Department, reversing a judgment entered upon the report of a referee.

Action for injunction to restrain the use of the overhead electric trolley system by the defendant, on account of contemplated injury to plaintiff's telephone system.

Plaintiff was organized in 1883, under the general telegraph statute of 1848. Defendant was incorporated as a turnpike company in 1828 ; was granted permission by a special statute in 1862 to construct and maintain a street railway on its road, and "with the consent, and with such restrictions as may be deemed proper by the common council of the city of Albany," to operate its road by "power of horses, animals, or any mechanical or other power, or the combination of them, which the said company may choose to employ, except the force of steam."

It obtained the required consent, operated a horse railway until 1889, when, with the consent of the common council, it fitted its road with appliances for electric propulsion.

The injuries complained of were the usual ones due to induction and conduction.

John S. Wise and Marcus T. Hun, for appellant.

Edwin Countryman and John A. Delehanty, for respondent.

MAYNARD, J.: All the injuries of which the plaintiff complains are due to the adoption by the defendant of the single trolley system of electric propulsion. It becomes, therefore, of the first importance to determine whether this change of motive power was authorized by law. The plaintiff makes a vigorous attack upon the right of the railway company to the enjoyment of such a franchise and urges many grounds in support of its position. We cannot assent to the argument of the learned counsel for the defendant that the determination of this question is immaterial, because the State alone, by its attorney-general, can bring suit for a usurpation of corporate powers, or because ordinarily the local authorities must prosecute for an unlawful obstruction of the streets, not involving the appropriation of private property. In the case of a corporation, exercising a delegated authority for the public benefit, the actionable quality of a private injury resulting therefrom may depend upon the legislative will, and the aggrieved party may be without remedy if the damage sustained is the result of the proper exercise of a power or privilege conferred by law, and a right of action is not given by express enactment. This immunity from liability does not, however, extend to acts which are *ultra vires*, or which are equivalent to a confiscation or condemnation of the property rights of the citizens, unless provision is made for due compensation. If the sovereign power has never granted to the defendant the right to make use of electricity in the traction of its cars in the streets of Albany, it must respond to the plaintiff and to all others whose lawful pursuits are invaded by its illegal procedure.

But we think it is clear that under the act of 1862 (ch. 233), and the ordinances of the common council of the city, the defendant was invested with the authority to adopt this method of transportation, and to place in the streets in question the apparatus and fixtures necessary for its practical and efficient use. The choice of a motive power is not expressly limited in the statute, except by the exclusion of the force of steam. It is not impliedly limited, except that

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the power selected must not be of such a kind or require such a mode of application as will make it a public nuisance, or render the passage of the streets unsafe or dangerous for travelers availing themselves of the ordinary means of locomotion.

The report of the referee removes all doubt with reference to the safety and practical usefulness of the system adopted by the defendant. He finds, in substance, that it is the most efficient and economical, and the best thus far devised, and less liable to accidents, through the displacement of machinery, than any other trolley system ; that it subserves the public interests and satisfies the public wants, with respect to transportation ; that it is not prejudicial to the public health, or dangerous to human life ; and that no other system of electric propulsion of cars has thus far been demonstrated to be as practical, effective and advantageous, both to the public and private interests, as the overhead, single trolley system.

As the evidence is not contained in the record, these findings must be deemed to have been supported by competent proofs, and they leave no room for the contention that the use of this system is unsafe, or dangerous, or in any degree a public nuisance.

The act of 1862 cannot properly be limited to such methods of operating street surface railways in cities as had then been invented and were then in actual use. The words of the statute are to be interpreted according to their natural and obvious meaning, and, as the terms employed are not ambiguous, extrinsic facts are not available to restrict the authority which it plainly confers. The language, literally construed, includes undiscovered as well as existing modes of operation. Electricity, as a natural and applied force, was then well known and it is reasonable to infer that its adaptation as a propelling power was even then anticipated. It would be an unjust reflection upon the wisdom and intelligence of the law-making body to assume that they intended to confine the scope of their legislation to the present, and to exclude all consideration

for the development of the future. If any presumption is to be indulged in, it is that general legislative enactments are mindful of the growth and increasing needs of society, and they should be construed to encourage rather than to embarrass the inventive and progressive tendency of the people. The application by the defendant for this new grant of power must have reminded the Legislature that in thirty years its original franchise of a turnpike way had proved inadequate for the wants of a thickly populous community, and it could not have failed to perceive that in a like period of time the operation of street cars by horse power might become obsolete or undesirable. It, therefore, wisely provided for the occurrence of such an emergency.

It is not to be denied that it is a sound rule of statutory construction which permits nothing to be taken in a grant of corporate powers, that is not plainly expressed, or unequivocally given, or not demanded by necessary implication. The defendant claims nothing more; but the plaintiff endeavors to cut down the franchise bestowed by eliminating from the statute the general words of the grant. As in 1862 these railways were run exclusively by animal power, the provision in section 4 of the act, which authorizes the defendant to adopt any mechanical or other power, or the combination of them, which it might choose to employ, except steam, was superfluous, if its range of selection is to be confined to the motive forces which had then been discovered and employed. The history of plaintiff's franchise is instructive upon this point. It is an intruder in the public streets and not possessed of any property rights which a court of equity can be invoked to protect, if the canon of construction which it insists upon applying to the grant of the defendant's franchises shall be allowed to prevail. It is incorporated under the act of 1848 (chapter 265), providing for the formation of telegraph companies. At that time, and for twenty years afterwards, the art of telegraphy, as known and practiced, did not include the transmission of human speech by

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means of the telephone over wires strung upon poles. But it has been held in other States and countries, and, as we think, rightly, that this form of transmitting messages through the medium of an electric current passing over extended wires is authorized by a statute for the incorporation of telegraph companies, although when the act was passed such form of communication was unknown. *Wisconsin Telephone Co. v. Oshkosh*, 62 Wis. 32; *Cumberland Telephone & Tel. Co. v. United Electric Railway Co.*, 42 Fed. Rep. 273; *Attorney-General v. Edison Telephone Co.*, L. R. [6 Q. B. D.] 244.

It would also be a narrow and illiberal construction of the statute to hold that the defendant was irrevocably bound by the choice of a motive power made in 1862. It then selected the only practicable one, but the authority to employ others was not thereby exhausted. It was a continuing privilege and was intended to be potential whenever and as often as the means of public travel might be improved or facilitated by its exercise. Equally flexible was the power given to the common council of the city to impose such reasonable conditions upon the enjoyment by the defendant of the franchises of a street railway company as in their judgment the interests of the public seemed to require. Their authority, in this respect, was coincident in extent with the company's right of selection. They could limit the municipal assent to a railroad operated in a specified way, as they did by the ordinance of 1862, and while that remained unmodified no other method could be lawfully used, and they could, by a subsequent ordinance, as in 1889, authorize the necessary changes to be made in the equipment of the streets for the introduction of electricity as a propelling force. This power is fairly inferable from the original act, and may also, perhaps, be deducted from the provisions of the city charter, which authorize them to regulate the use of the streets by railways.

This case is clearly distinguishable from that of the Third Avenue Railroad (112 N. Y. 396) cited at length by plaintiff.

iff's counsel. There the railroad company had no express grant of legislative authority, and the consent of the municipality was refused. It attempted to override the local authorities and compel them by mandamus to give their approval to the opening and excavation of the streets for the purpose of substituting a subsurface mode of operation, when the granting of the permission plainly involved the exercise of judgment and discretion. It was held that under such circumstances the department of public works could not be coerced to act favorably upon the company's application. But the case is not authority for the broad proposition, for which the plaintiff contends, that where the right to select a motive power is expressly given and is not limited, either as to time or kind, and a selection has been made with the approval of the city authorities, the company cannot subsequently adopt a new and better system of propulsion upon obtaining the municipal consent thereto.

The defendant was not subject to the provisions of section 12 of the Street Surface Railroad Act of 1884 (ch. 252), as amended by chapter 531 of the laws of 1889, requiring the approval of the railroad commissioners and the consent of the owners of one-half in value of the property abutting upon the streets.

It had the right to make the change under the act of 1862, upon obtaining the consent of the common council, and hence it is embraced within the saving clause contained in section 18, which declares that the act of 1884 shall not interfere with, repeal, or invalidate any rights theretofore acquired under the laws of the State by any horse railroad company, or affect or repeal any right of any existing street surface railroad company to construct, extend, operate and maintain its road in accordance with the terms and provisions of its charter and the acts amendatory thereof. Inchoate, as well as perfected rights are saved by such a provision. *N. Y. Cable Co. v. Mayor, etc.*, 104 N. Y. 1.

The defendant's authority to use electric motors in the propulsion of its cars in the streets of Albany and to operate

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them by the single trolley system, cannot, therefore, be successfully questioned and, unless some actionable damage has resulted, or will result, to the plaintiff therefrom, its complaint was properly dismissed by the trial court.

There is no question of prior equities involved. It is a matter of strict legal right. Neither priority of grant nor priority of occupation can avail either party. The plaintiff has a franchise which is entitled to protection, but the prime difficulty it encounters grows out of its subordinate character. It has been given and accepted upon the express condition that it shall not obstruct or interfere with the enjoyment by the defendant of its franchises. The plaintiff is not using the streets for one of the purposes to which they have been dedicated as public highways, while the defendant is occupying them in such a manner as to expedite public travel and promote the public use to which they were originally devoted. The condition contained in the plaintiff's grant would have been implied had it not been expressly named.

The primary and dominant purpose of a street is for public passage, and any appropriation of it by legislative sanction to other objects must be deemed to be in subordination to this use, unless a contrary intent is clearly expressed. The inconvenience or loss which others may suffer from the adoption of a mode of locomotion authorized by law, which is carefully and skilfully employed, and which does not destroy or impair the usefulness of a street as a public way, is not sufficient cause for a recovery, unless there is some statute which makes it actionable. A different rule prevails if there has been an encroachment upon private rights to the extent of an appropriation of private property, and it was upon this ground that the decision in the elevated railroad cases was placed. *Story v. N. Y. E. R. R. Co.*, 90 N. Y. 122; *Lahr v. Met. E. R. R. Co.*, 104 id. 268. It was there held that an abutting owner has an easement of light, air and access in the street in front of his premises, of which he cannot lawfully be

deprived without compensation, by the erection and use of an elevated railway structure.

But the plaintiff has no easement in the public streets. It is there by virtue of a legislative grant revocable at the pleasure of the power which made it, constituting, while it continues, a valuable franchise, which is recognized as property in the fullest sense of the term. *People, etc., v. O'Brien*, 111 N. Y. 1. The plaintiff's title to his property is, however, encumbered by a condition which diminishes its value, and it cannot rightfully complain of the burden which it has voluntarily assumed. It is a part of its compact with the State that the maintenance of its lines of communication shall not prevent the adoption by the public of any safe, convenient and expeditious mode of transit, such as the defendant's system has been shown to be. It is not deprived of any property right, but is simply compelled to yield the subservience which it is bound to render under the charter which gave it existence.

These considerations necessarily dispose of one of the grounds upon which the plaintiff claims to be entitled to relief from the special injury sustained by the acts of the defendant, namely, the derangement of the electric currents upon its lines of wire by means of induction, as it is called in electrical dynamics.

It seems to be indispensable to the successful prosecution of the plaintiff's business, that it should make use of an exceedingly weak and sensitive current of electricity. By a law of electric force, not clearly defined or understood, the transmission of a powerful current, such as the defendant must use to supply motion to its cars, along a line of wire parallel with and in close proximity to the plaintiff's wires, induces upon the latter an additional current, which renders the operation of the plaintiff's telephones at all times difficult and sometimes impracticable. It is found that this disturbance cannot be avoided by the defendant without a complete change of the system adopted, and the use of motors which are more expensive, more dangerous and less useful and efficient. It is obvious, that to require such change to be

made would be to grant to the plaintiff, by a decree of the court, that which the Legislature has expressly and intentionally withheld. But the plaintiff is exposed to another danger which deserves consideration, Its system of communication is only partially established in the public streets. Its telephones are located up on the premises of its subscribers and patrons, and at a central exchange, which is upon private property. Its instruments are connected by branch wires with the main wires suspended upon the poles in the streets. To render their respective plants available, both parties must have a return electric current, and both use the earth for that purpose. The plaintiff grounds its wires upon private property and, in many cases, connects them with the gas and water pipes, and, in this way, establishes and completes its required circuit.

It is immaterial whether its wires are grounded upon its own property or that of others, who permit the plaintiff to so use their premises. Its possession as a licensee would be lawful while the license continues. The defendant allows the electric current used for the movement of its cars to escape or discharge, at least in part, directly from the rails into the ground, from whence it spreads or flows, by reason of the conductivity of the earth, upon plaintiff's grounded wires, and the most serious loss which the plaintiff sustains results from this cause, which is scientifically known as conduction. The defendant insists that it has an equal right with plaintiff to make use of this property, or law of nature, in the conduct of its business, just as all are entitled to the common use of the air and light of the heavens, which, in a certain sense, is undoubtedly true. But the defendant does something more. It does not leave the natural forces of matter free to act unaffected by any interference on its part. It generates and accumulates electricity in large and turbulent quantities, and then allows it to escape upon the premises occupied by the plaintiff to its damage.

We are not prepared to hold that a person even in the prosecution of a lawful trade or business, upon his own land, can gather there by artificial means a natural element

like electricity, and discharge it in such a volume that, owing to the conductive properties of the earth, it will be conveyed upon the grounds of his neighbor with such force and to such an extent as to break up his business, or impair the value of his property, and not be held responsible for the resulting injury. The possibilities of the manifold industrial and commercial uses to which electricity may eventually be adapted, and which are even now foreshadowed by the achievements of science, are so great as to lead us to hesitate before declaring an exemption from liability in such a case. It is difficult to see how responsibility is diminished or avoided, because the actor is aided in the accomplishment of the result by a natural law. It is not the operation of the law to which the plaintiff objects, but the projection upon its premises by unnatural and artificial causes of an electric current in such a manner and with such intensity as to materially injure its property. It cannot be questioned that one has the right to accumulate water upon his own real property and use it for a motive power; but he cannot discharge it there in such quantities that, by the action of physical forces, it will inundate his neighbor's lands and destroy his property, and shield himself from liability by the plea that it was not his act, but an inexorable law of nature that caused the damage. Except where the franchise is to be exercised for the benefit of the public the corporate character of the aggressor can make no difference. The legislative authority is required to enable it to do business in its corporate form, but such authority carries with it no lawful right to do an act which would be a trespass, if done by a private person conducting a like business. If either collects for pleasure or profit the subtle and imperceptible electric fluid, there would seem to be no great hardship in imposing upon it, or him, the same duty which is exacted of the owner of the accumulated water power—that of providing an artificial conduit for the artificial product, if necessary to prevent injury to others.

But the record before us does not require a determina-

tion of the question in this form. The use which the plaintiff is making of its grounded wires is a part of its system of telephonic communication through the public streets, and a necessary component of the service it maintains there under the permission of the State, and is subject to the condition that it shall not incommode the use of the streets by the public. It is one indivisible franchise and is in its entirety subservient to the lawful uses which may be made of these thoroughfares for public travel. In this respect no distinction can be made between the injuries resulting from induction and conduction.

In the disposition of this appeal there has been no occasion to make any application of the rule that where a public use authorized by law takes no property of the individual, but merely affects him by proximity, the necessary interference in his business or in the enjoyment of his property occasioned by such use furnishes no basis for damages. *Radcliff's Exrs. v. Mayor*, 4 N. Y. 195; *Bellinger v. N. Y. C. R. R.*, 23 id. 42; *Moyer v. N. Y. C. & H. R. R. R.*, 88 id. 351; *Uline v. N. Y. C. & H. R. R. R.*, 101 id. 98; *Am. Bk. Note Co. v. N. Y. E. R. R. Co.*, 129 id. 252. Under such a rule it would be a grave question whether the injuries to which the plaintiff was subjected would not, if made permanent, constitute a servitude upon its property which could not be imposed without compensation, provided the parties were occupying the streets upon an equal footing. As was said by Judge ANDREWS in *Cogswell v. N. Y., N. H. & H. R. R. Co.* 103 N. Y. 14: "It is, in many cases, difficult to draw the line and to determine whether a particular use is consistent with the duties and burdens arising from vicinage, or whether it inflicts an injury for which the law affords a remedy."

We are spared the task of discrimination in this case by reason of the legal attitude which the plaintiff has assumed in the occupation of the streets. It has accorded to the public, by the manner in which it has elected to use its franchise, the unrestricted right of passage, and it cannot question the form in which such right shall be enjoyed so

long as it is of lawful origin and is utilized with proper care and skill. The defendant's mode of conveyance of passengers is of this character, and the plaintiff can no more justly complain of its loss from this source than it could if, by the jarring of loaded vehicles passing up and down Broadway, its delicate and sensitive instruments were displaced and their beneficial use impaired or destroyed.

There is also an appeal by the defendant from an order denying a motion for an extra allowance of costs. The decision of the court below was placed upon the ground of a want of power, and the special reason assigned was "that the action being to restrain the defendant from employing a particular system only, and over a part only of the road, the franchise was not involved, and there is, therefore, no basis on which an allowance can be estimated."

In denying the motion for this sole cause we think the Supreme Court erred. The subject matter of the controversy litigated was the right of the defendant to use the single trolley system in the operation of its road upon Broadway and South Ferry street, and the prayer for relief in the complaint is that an injunction issue "restraining the defendant from operating its said railroad through the city of Albany by the electric system herein described." If the right thus sought to be perpetually enjoined has a money value, and there was any evidence in the moving papers tending to establish such value, the court had jurisdiction to entertain the motion, and it was its duty to exercise its discretion and dispose of the application upon its merits. We have examined the record sufficiently to satisfy us that there was some proof of this character.

One witness testifies that the right of the defendant to run its cars by electric motors upon the single trolley system in the city of Albany is worth to the company the sum of at least \$300,000, and as against the double trolley system, or any other known system, at least \$76,000. We are not permitted to say how much this and other similar evidence may be worth. We are dealing exclusively with a question of power. Whether there shall be any allowance

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at all, or what the amount of it shall be, and how far the hardships of the plaintiff's situation shall affect the allowance, if at all, are questions primarily to be considered by the Special Term and can be safely intrusted to its determination. The authorities cited in the opinion of the General Term were all cases where no evidence was presented as to the commercial value of the right or franchise in question, and the decision was that in the absence of such evidence it could not be presumed to have a particular value. The just inference from them is that if such proofs had been submitted the court might have considered them as a basis of an allowance. *People v. Genessee Valley Can. R. R. Co.*, 95 N. Y. 666; *Conaughty v. Saratoga Bank*, 92 id. 401; *Heilman v. Lazarus*, 12 Abb. N. C. 19.

The order of the General Term granting a new trial must be reversed and the judgment entered upon the report of the referee affirmed, with costs in all courts.

The order denying the motion for an additional allowance should be reversed, with costs, and the motion remitted to the Supreme Court to be there heard upon its merits.

All concur.

Order reversed and judgment affirmed.

NOTE.— This is the same case which, upon a previous appeal, is reported in vol. 8 of this series, at pages 387 and 395.

The opinion of the General Term of the Supreme Court, which is here reversed, is reported 61 Hun, 140.

See note to next case.

**THE STATE, EX REL. WISCONSIN TELEPHONE COMPANY,
Appellant, v. JANESVILLE STREET RAILWAY COMPANY,
Respondent.**

Wisconsin Supreme Court, Jan. 30, 1894.

(87 Wis. 72.)

INTERFERENCE.—MUNICIPAL CONTROL.—MANDAMUS.

It is within the inherent police power of a municipal corporation to regulate or restrain the use of electricity as a motive power within the corporate limits.

An ordinance requiring the maintenance of guard wires by an electric railway company "whenever it shall be necessary to cross telephone lines" applies to existing as well as to future conditions.

A telephone company which has lawfully and at great expense established and maintained its lines in the streets of a city has the right to the remedy of mandamus to compel an electric railway company, much later in the field, to place guard wires so as to protect the telephone line from interference: It appearing, in the given case, that the apparatus and employes of the telephone company were in constant danger; that guard wires are an effective remedy; and that they were required by city ordinance, which the defendant had neglected to obey.

Cases of this series cited in opinion: *People v. Squire*, vol. 2, p. 176; *W. U. Tel. Co. v. Mayor of New York*, vol. 2, p. 195; *Wisconsin Teleph. Co. v. Oshkosh*, vol. 1, p. 687; *Mutual Union Tel. Co. v. Chicago*, vol. 1, p. 506; *W. U. Tel. Co. v. Philadelphia*, vol. 2, p. 98; *Am. Un. Tel. Co. v. Town of Harrison*, vol. 1, p. 291.

APPEAL by relator from judgment of Circuit Court, Rock county, denying motion for a writ of mandamus.

Facts stated in opinion.

Miller, Noyes & Miller and *Fethers, Jeffris & Fifield*,
for appellant.

Jackson & Jackson, for respondent.

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ORTON, C. J.: This is an appeal from an order of the Circuit Court sustaining the demurrer of the respondent to the relation of the appellant, and quashing the alternative writ of *mandamus*. The material facts set out in the relation are briefly as follows:

The relator, the telephone company, obtained its right from the State to do business in the city of Janesville, and to erect and maintain poles, cross-arms and wires over and through the streets, ways and alleys of said city, and operated telephone wires and erected poles in the streets, ways and alleys, with the permission, consent and approval of said city, from 1879 until the present time, at a great expense, and has now 151 telephones in said city and suburbs. The main trunk lines of the poles and wires have been, and are now, maintained upon East, Main and Milwaukee streets. All the rights, right of way and easements that it had previously enjoyed as a telephone company were confirmed by an ordinance of said city, dated October 10, 1892, a copy of which is attached hereto, and marked "Exhibit 1," and the company has since exercised and enjoyed the same, and all the said lines and poles have been where they are now for years, with a few exceptions, and where they should be. The relator has complied with the statutes of the State, and paid its license fee, and has a license to do business as a telephone company. The defendant is a corporation by the laws of the State, and obtained its rights to operate a street railway in said city by horse power by ordinances of said city, dated October 8 and November 25, 1885, and operated the same on the same streets upon which the relator had its poles and wires, among others East, Main and Milwaukee streets. By an ordinance of the city, dated December 15, 1891, the former ordinances were so amended as to give the defendant the right to use "electrical power" in operating its street railway, and on a single or double track, with all necessary curves, turnouts, switches, poles, brackets and wires. The defendant has erected its poles, wires, and overhead wires, over and above the streets already occu-

pied by the relator in the manner aforesaid, and, among others, East, Main and Milwaukee streets, in said city. The defendant company is compelled to use very strong conductors of electricity to run its cars, and it uses main and trolley wires, which are not insulated, while the wires of the relator are insulated, and, though good and sufficient, can only use feeble and delicate currents of electricity in telephoning. The currents used by the defendant are exceedingly dangerous to property and persons, by setting fire to buildings, and by injuring persons coming in contact therewith. The poles of the relator are liable to break, and the wires to break and fall, by the force of storms, and this cannot be prevented; and when the wires do fall they make direct crosses with the wires of the defendant, and the high-tension currents of electricity used by the defendant pass in the wires of the relator, and destroy its instruments and other property, and endanger the health of its employes and others, and are liable to set fires in the city. If the defendant had constructed its railway system properly, it would have placed "guard wires" at not less than four feet above its trolley wires, and in that manner prevented such serious consequences by restraining and carrying off the high-tension currents safely. Such guard wires, so placed and maintained, are the approved method of avoiding or preventing the threatened mischief. The defendant is required to apply such safeguards by an ordinance of the city, dated October 10, 1892. The relator has complied with said ordinance, and the defendant has failed to do so. This is the substance of the relation.

We are of opinion that the facts set out in the relation are sufficient to entitle the relator company to the remedy asked for: (1) The telephone company occupied the streets of the city with its poles and wires, and was in the safe and successful prosecution of its business, under the authority of law and "by the permission, consent, and approval" of the city of Janesville. (2) The defendant company afterwards sets its poles and extends its wires

along the same streets, so that its lines frequently cross the lines of the relator, and in such near contact as to endanger the persons in its employment, and its property, and threaten the destruction of its business. Has the defendant the right to do this, if it is in its power to prevent the threatened mischief? By the common maxim that one person has no right to use his own to the injury of another, and by the common principles of elementary law, it would seem that it had not. The defendant has intruded upon the established business of the relator in such way as to endanger it and the persons engaged in it, when, by the adoption of such a simple safeguard and the only practicable one, such danger can be avoided and the business of both subsist together. Ought not the defendant to be compelled to adopt such safeguard? These facts are admitted by the demurrer. The learned counsel of the respondent insists that the relator had not such priority of its business by any right. It is averred in the relation that it was established according to law and prosecuted "by the permission, consent, and approval" of the city. That would clearly give the relator a right, and that right and its enjoyment were prior to any right of the defendant. The relator's wires are up in the streets, bearing sufficient electrical power to make telephonic communications, and the defendant crosses them at many places with its wires, bearing electrical power sufficient to propel the cars upon its street railway, and the first storm that comes may blow down the poles and wires of the relator, and its wires come in contact with the wires of the defendant, where they cross each other, and become charged with its dangerous currents of electricity, set fire to the buildings in which the telephone instruments are used, and injure other property and the persons employed in the "Exchange" and other places, so as to endanger or destroy the business of the relator. Ought not the defendant to be compelled to adopt the above safeguards to prevent this threatened mischief, or to withdraw its lines from the vicinity of the relator's wires? The company that caused the mischief ought to repair it.

Section 7 of the ordinance of the city, dated October 10, 1892, imposes this duty upon the company using this "electrical power system" in all cases, and requires it to apply such safeguards under a penalty. But much more is it the duty of such company when it is an intruder upon the already established business of another company. The electric force is the most powerful and dangerous agency of nature, and, even when restrained or controlled by the most perfect machinery and appliances, its high-tension currents are extremely dangerous in many directions. If a municipal corporation has not the inherent provisional or police power to pass ordinances to regulate or restrain the use of such a dangerous agency within the corporate limits, it certainly cannot have such power for any purpose.

It is claimed that said ordinance has only *future* operation or effect. In application to the case, sec. 7 of said ordinance provided: "Whenever it shall be necessary to cross * * * telephone line or lines of any wires used," etc. Has it not been necessary for the defendant company to cross these telephone lines or wires of the relator since the passage of the ordinance, and is it not now necessary to do so? Then the ordinance, by its terms, is applicable to this case. The ordinance is made to regulate existing things, and things which continue to exist, as the wires of the defendant cross the wires of the relator. Whenever, at any time, wires so cross, this safeguard must be applied. The ordinance has a present and future effect. It is said these wires crossed before the ordinance was passed. That is true, and they have continued to cross ever since, in violation of the ordinance. The ordinance does not *prohibit* the crossing of such wires. It provides the remedy for it as an existing evil, and requires safeguards to be so placed as to avoid the danger to persons and property. It is not *retroactive* in any sense.

First. The ordinance is reasonable, because it requires that to be done which in law and good conscience the defendant ought to do for the protection of the relator, whose established business it has endangered and dis-

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turbed. *Second*. It is clearly sustained under the police power of the city. "The test is whether it is designed and tends to protect some public or private right from the injurious act of the company; as when it prohibits the running of the cars of one company on any street so near the depot of another railroad as to interfere with safe and convenient access to the latter road." Tied. Lim., 597-599. The statute of New York, requiring telegraph, telephone and electric wires to be placed underground in streets in certain cities (ch. 499, laws of 1885), was upheld in *People, ex rel. N. Y. E. L. Co. v. Squire*, 107 N. Y. 593; *Western Union Tel. Co. v. New York*, 38 Fed. Rep. 552. The right and authority in a city, "to regulate, control and prohibit the location, laying, use, and management of telegraph, telephone and electric light and power '*wires and poles*,' * * * in order to guard and secure the public safety and convenience", is upheld in *Wisconsin Tel. Co. v. Oshkosh*, 62 Wis. 32. Ordinance to regulate street railways is upheld in *State, ex rel. Atty.-Gen. v. Madison St. R. Co.*, 72 Wis. 612; and in *State, ex rel. C. C. R. Co. v. Hilbert*, 72 Wis. 184. Cities can regulate the placing of electric wires in the streets. *Keasbey, Electric Wires*, 38; *Van Hook v. Selma*, 70 Ala. 361; *Mutual Union Tel. Co. v. Chicago*, 16 Fed. Rep. 309; *Delaware, L. & W. Co. v. East Orange*, 41 N. J. Law, 127; *Western Union Tel. Co. v. Philadelphia* (Pa. Sup.), 12 Atl. Rep. 144; *American Union Tel. Co. v. Harrison*, 31 N. J. Eq. 627; *Toledo W. & W. R. Co. v. Jacksonville*, 67 Ill. 37; *Sioux City St. R. Co. v. Sioux City*, 138 U. S. 98. There can be no question at this late day but that our municipal corporations may make all reasonable regulations for the location and use of electric wires in the streets, and require all reasonable safeguards for the same. The question is virtually so settled in this State by our own decisions.

The relator is entitled to sue out the writ of *mandamus* to compel the defendant to properly place such guard wires as the proper safeguard in such a case to protect its rights and safety. The relator is especially interested in the

defendant's performance of this public duty. It is admitted to be true that such guard wires so placed are the very best and most approved method of safeguard in such case. This, then, is a clear, legal right to be enforced by *mandamus*. *Marbury v. Madison*, 1 Cranch, 137; *Union Pac. R. Co. v. Hall*, 91 U. S. 343; *People, ex rel. Hunt v. C. & A. R. Co.*, 130 Ill. 175. There is no adequate remedy in such a case, except by the writ of *mandamus*, to compel the respondent company to do what it is clearly right for it to do, and that the relator has the right to compel it to do. The penalty enforced would not cure the mischief. *Rex v. Barker*, 3 Burrows, 1266; Scott & J. Tel. § 78; High, Extr. Leg. Rem. § 320; *People, ex rel. Kimball v. B. & A. R. Co.*, 70 N. Y. 569; *Haines v. People*, 19 Ill. App. 354; *People, ex rel. Bloomington v. C. & A. R. Co.*, 67 Ill. 118; *Ohio & M. R. Co. v. People*, 121 Ill. 483; *Indianapolis & C. R. Co. v. State*, 137 Ind. 489; *State, ex rel. Winterburg v. Demaree*, 80 Ind. 519; *Uniontown v. Comm.* 34 Pa. St. 293; *Howe v. Commissioners*, 47 Pa. St. 361; *Queen v. Trustees Luton Roads*, 1 Q. B. (Adol. & E., N. S.) 860; *Cambridge v. C. B. R. Co.*, 7 Met. 70; *Railroad Comrs. v. P. & O. C. R. Co.*, 63 Me. 269; *State, ex rel. Blake v. N. E. R. Co.*, 9 Rich. Law, 247; *State v. H. & N. H. R. Co.*, 29 Conn. 538; *State, ex rel. Van Vliet v. Wilson*, 17 Wis. 687; *State, ex rel. Treat v. Richter*, 37 Wis. 275; *State, ex rel. Neaves v. Wood Co.*, 41 Wis. 28; *State, ex rel. Grady v. C. M. & N. R. Co.*, 79 Wis. 259; *Overseers of Porter Tp. v. Overseers of Jersey Shore*, 82 Pa. St. 275.

It is said that no such damages have yet accrued. The relation very clearly shows that such damage is imminent and threatening, and the danger is all the time present. This might be sufficient ground for an injunction to restrain the defendant from crossing the wires of the relator with its wires—a much more violent remedy. The relator does not seek to prohibit such crosses, but only to make them safe. The relator is conducting its telephone business under constant fear and apprehension. Must it wait till the full extent of the apprehended consequences shall have been

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realized? The remedy sought is clearly the proper one. The demurrer of the respondent to the relation, and the motion to quash the writ, should have been overruled.

By the Court:—The order of the Circuit Court is reversed, and the cause remanded with direction to overrule the demurrer and the motion to quash the writ, and for further proceedings according to law.

NOTE.—The foregoing five cases and the one next following relate to the rights and duties toward each other of different electrical companies in the use of streets. In the first two cases (pp. 250 and 256), the parties litigant were both electric light companies, and in that respect on equal footing; and in each was recognized the principle that the one first lawfully in occupation obtained rights which could not be interfered with.

In the remaining cases, as in most of those previously reported (see note at vol. 3, page 460), the contest arose between a telephone company plaintiff and an electric street railway company, defendant. But it will be observed that while telephone companies cannot restrain electric railway companies from operating their roads, on the ground of threatened injury from interference, they still have rights which railway companies are bound to respect.

Thus in the Pennsylvania case, *ante*, p. 260, a preliminary injunction granted to the telephone company, plaintiff, was continued against such maintenance of the electric railway appliances as would endanger plaintiff from actual contact of wires, though discharged as to induction and conduction.

In the Wisconsin case, p. 289, the right of a telephone company first in the field, to protection against contact of its wires with those of an electric street railway, was recognized.

In the New York case, p. 275, the question whether or not the duty of the railway company to so exercise its right to use the streets as not to injure other users, might not be invoked in favor of the telephone company, was considered but was decided in the negative: "This will not avail the telephone company, since its use of grounded wires is part of its system of telephonic communication, its use of the streets for which is in its entirety subject to the lawful purposes of public travel."

In the Tennessee case, next following, the action was brought to recover the sums expended by the telephone company in obviating the dangers from induction, conduction and contact of wires, and it was decided that as to the two last the plaintiff could recover, but could not as to induction.

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**THE CUMBERLAND TELEGRAPH & TELEPHONE COMPANY
v. THE UNITED ELECTRIC RAILWAY COMPANY.***Tennessee Supreme Court, March 11, 1894.*

(93 Tenn. 492.)

INTERFERENCE.

The complainant, a telephone company, and the defendant, an electric railway company, being each in occupation of the same streets under statutory and municipal authority (the former company, however, being first in occupation, but its occupation being subject to the condition that "the ordinary use of such public highways be not thereby obstructed,") the complainant's business became so injuriously affected by conduction, induction and conflict of poles and wires, that it took measures to secure relief, adopting the McLeuer device to overcome conduction, deparallelization of the wires for induction, and higher poles to prevent conflict. It appeared that the means adopted were the best known for the respective purposes and that the telephone company alone could conveniently adopt them. There was no controversy as to the amount or reasonableness of the expense incurred.

Held, that induction must be remedied at the expense of the complainant, since the use of streets by an electric railway is an "ordinary use," and induction is technically an "obstruction" thereof by the telephone company.

That conduction was not a result of or necessarily connected with street use, the telephone company making all its ground connections upon private property, but was caused by a failure of the railway company to observe the rule, *sic tuo utere ut alienum non laedas*, and that that company must pay the expense of applying the remedy.

And the same as to the remaining difficulty, since the defendant could, and being last in the field should, have so placed its appliances as not to conflict with those of the complainant.

Cases of this series cited in prevailing opinion: *Taggart v. Newport St. Ry. Co.*, vol. 3, p. 306; *Halsey v. Rapid Transit Street Railway Co.*, vol. 3, p. 283; *Mt. Adams, &c. Ry. Co. v. Winslow*, vol. 2, p. 262; *Detroit City Railway v. Mills*, vol. 3, p. 833; *Cincinnati Inclined Plane Ry. Co. v. City, &c., Assn*, vol. 3, p. 443; *Lockhart v. Craig St. Ry.*, vol. 3, p. 314; *Hudson River Teleph. Co. v. Watervliet T. & R. R. Co.*, vol. 3, p. 395; *Cumberland Tel. & Teleph. Co. v. United Elec. Ry. Co.*, vol. 3, p. 408.

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APPEAL by plaintiff from judgment of Circuit Court, Davidson county. Facts stated in opinion.

Vertres & Vertres, for plaintiff.

East & Fogg and *J. C. Bradford*, for defendant.

G. W. PICKLE, S. P. J. : This is a suit by a telephone company against an electric street railway company to recover damages inflicted upon the telephone plant by the contiguous railway plant. The plaintiff has appealed from an adverse judgment and assigned errors.

The facts are practically undisputed, and, so far as they are material or pertinent to the questions to be determined, are as follows: The plaintiff, a Kentucky corporation, had, prior to 1889, established, in the city of Nashville, a telephone plant upon the "single wire" plan or system. The earth, under this system, is used as the return conductor to complete the electrical circuit, and the overhead "single wire" must have earth connections at both ends, at the "exchange" and at the subscriber's. These earth connections of plaintiff's wires were effected upon private property at both ends, upon the company's property at the "exchange," and upon the subscriber's property, by his consent, at the other end. The poles upon which plaintiff's wires were stretched, were planted in the public streets by permission of the city council, and by authority of a general statute of this State which empowers telephone and other like companies, both foreign and domestic, to construct, operate, and maintain, upon consideration of certain benefits conceded to the State and general government, their lines "along and over the public highways and streets of the cities and towns of this State; *Provided*, That the ordinary use of such public highways, streets, etc., be not thereby obstructed." Acts 1885, ch. 66.

In telegraphy, of which telephony is but another form, it has been the universal practice for half a century to use the earth as the "return circuit."

The plaintiff's plant was constructed in accordance with an approved system, and the one chiefly used in all the large cities of the United States.

The electric currents required and used in the operation of plaintiff's plant cause no hurtful disturbance anywhere of natural electric conditions.

The plaintiff's plant, thus constructed, was in perfect condition and successful operation, rendering satisfactory service to its patrons. When, in 1889, the defendant, a domestic corporation, having obtained control of the street railways of Nashville, which had, with one unimportant exception, been operated by horse power, constructed and put into operation thereon a "single trolley" overhead electric railway system.

Defendant's action in this particular was authorized by general public statutes of the State, which provided that street railway companies that had hitherto used animal power for the operation of their cars, might, with consent of the city authorities, adopt electricity as a motive power. Acts 1887, ch. 65; 1889, ch. 40. The required consent of the city authorities was obtained by defendant.

While there are two systems of electric street railways, the "single trolley" system and the "double trolley" system, the former is the more approved and satisfactory, and the one in general use. It is better adapted, than the "double trolley" system, to single track railways like defendant's. It is likewise cheaper.

The defendant's plant was properly constructed and equipped according to the "single trolley" system.

The earth is used as a "return circuit" in the operation of street railways constructed upon the "single trolley" plan, but not for those operated upon the "double trolley" plan.

The defendant, in the operation of its plant, generates or collects electricity in such unusual quantities, and applies and uses it in such violent, turbulent, and varying currents, as to produce a non-natural and disturbed condition elec-

trically, not only within the streets, but for the distance of half a mile on either side.

The plaintiff's entire plant was, for a time, paralyzed, and its utility destroyed, by the construction and operation of defendant's plant or system. The injuries, so fatal to plaintiff's franchise and plant, resulted by several methods that it is important to describe.

First. Injury resulting from what is known as conduction or leakage. Currents of electricity of great strength and power are generated and applied by defendant in the propulsion of its cars. These abnormal currents of the electrical fluid are poured out or permitted to escape into the streets. They overflow the streets and invade private property for half a mile on either side, and, finding the earth connections of the telephone wires at the exchange and at the subscriber's, pass up into those wires and the telephone instruments, and, by reason of their great force and volume, substantially destroy the utility of the telephone plant. This interference can be obviated in only one way, viz., by a metallic "return circuit" for one of the plants. The only metallic "return circuit" for a railway yet discovered is that known as the "double trolley" system. The "double trolley" system is more expensive than the "single trolley" system, and inferior in other respects for the operation of single track railways.

A recent invention, known as the "McLeuer device," has been proved by experience to be an effective remedy for the disturbances caused by conduction. This "McLeuer device" consists of a large copper wire supported on poles, with which the outgoing telephone wires are connected at both ends, and which serves as a "return circuit" instead of the earth. The "McLeuer device" is the most effective and least expensive remedy that has been discovered for the disturbances caused by conduction. The plaintiff was compelled, in order to reclaim its plant, to put in this "McLeuer device," at a cost of \$3,660.58.

Second. Injury resulting from what is called induction or parallelism. The wires of the telephone company and

of the railway company are parallel upon some of the streets.

It is a physical fact of much importance in electrical mechanism that, when two wires of two circuits are parallel to each other, and there is a current of varying intensity on one of them, this will produce in the other in the opposite direction, a current of electricity of similar variation. The amount of induction depends upon variation in current, the distance of the wires from each other, and the length of the parallelism of the wires. The current upon the trolley wire and the feed wire of the railway is quite variable in quantity and intensity, owing to the drain upon the store of the electricity by the moving and stopping of the car. Nor is the electricity, as generated, exactly uniform in its flow from the dynamos. The result is, wherever the telephone wire is parallel with the trolley wire and feed wire, there is induced upon the telephone wire a current whose variation corresponds with the variations of the electrical current on the electric railway wires, thereby producing such disturbances as render the use of the telephone plant impracticable. But one practicable remedy has been discovered for the disturbances caused by induction; that is, to destroy the parallelism of the wires of the two circuits. This remedy is practicable for the telephone company alone. The expense incurred by plaintiff on this account was \$856.30.

Third. The plaintiff expended \$816 in putting up higher poles on Main street, in consequence of conflict produced by the erection of defendant's poles and wires. The plaintiff's poles occupied one side of Main street, and defendant's poles were put up on both sides of said street, and conflicted with plaintiff's poles and wires so as to render it necessary for plaintiff to put in new and higher poles.

The majority of the court think the defendant could have reasonably avoided this conflict by supporting its wires upon a single line of poles, with arms, erected through the middle of the street, or upon the opposite side from the

telephone poles and wires. Judge SNODGRASS and the writer of this opinion do not concur in this finding of fact.

The contention of the parties will be stated and disposed of in order, and so much of the court's charge as may be deemed material will be stated in the proper connections.

The fact that plaintiff sustained loss in consequence of the construction and operation of defendant's plant is admitted by defendant. The amount of that loss is accurately ascertained, and is not a matter of controversy. The sole question for determination is defendant's liability for that loss. The loss by conduction is distinct from that resulting from induction, and from conflict of the poles and wires of the two systems. The two items last named, loss by induction and by conflict of poles and wires, may be conveniently considered together as involving the same or similar questions. But loss by conduction will be considered apart from other matters.

First. Is defendant liable for loss that plaintiff sustained from induction and from conflict of the poles and wires of the two systems? This loss, unlike that caused by conduction, occurs upon and within the streets, and is a direct and immediate result of plaintiff's occupation and use of the streets simultaneously with defendant.

It is important to ascertain the exact status and relative rights of these companies as regards their use and occupation of the public streets. Both are *quasi* public corporations of the same general character. Both serve important public ends and needs, and are equal candidates for public favor. Both derive their rights and franchises from the same source—a public general statute—and exercise them by permission of the same city authorities. The Legislature intended that both should continue to exist under conditions favorable to the accomplishment of the purpose of their creation. No purpose to sacrifice one for the benefit of the other is apparent. It is therefore not quite accurate to say that defendant has the dominant, and plaintiff a subservient use of the streets. Their respective rights to occupy and use the streets are

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co-ordinate. Each, within its own sphere, is independent of the other. The defendant's right is to use the streets for the erection and operation of an electric railway. Acts 1887, ch. 65; Acts 1889, ch. 40. And this, it is insisted, is a strictly legitimate and ordinary street use. The plaintiff's right is to use the streets incidentally in the erection and operation of a telephone plant, with the proviso that the ordinary use of the streets be not thereby obstructed.

It is perfectly clear that no conflict can occur between these companies in the use of the public streets, if each shall remain within its proper sphere and exercise its powers with that careful and prudent regard for the rights of the other which the law enjoins. The defendant must exercise care and prudence to avoid injury to plaintiff, and plaintiff must not obstruct defendant's use of the streets, if that be an "ordinary use." Is an electric street railway an ordinary use of the streets? There can be no substantial distinction between an ordinary and a strictly legitimate use of the streets.

With rare unanimity the courts have concurred in holding that an electric street railway, constructed and operated upon the streets by means of an overhead trolley wire supported by poles, with permission of the public authorities, for the transportation of passengers only, and conforming its track to the surface of the ground, is not an additional servitude upon the fee within the streets, but a legitimate use of the streets within the original general purpose of their dedication. *Taggart v. Newport Street Railway Co.*, 2 Am. R. R. & Corp. Cas. (R. I.) 44; *Halsey v. Rapid Transit St. Ry. Co.*, 47 N. J. Eq. 380; *Mt. Adams, etc., Ry. Co. v. Winslow*, 3 Ohio Cir. Ct. R., 425; *Detroit City Ry. v. Mills*, 85 Mich. 634; *Cincinnati Inc. Pl. Ry. Co. v. City, etc., Asn.*, 12 L. R. A. (Ohio), 534; *Lockhart v. Craig St. Ry.* 139 Pa. St., 419; (6 Am. R. R. & Corp. Cas. 335.) Streets were designed to afford facilities for the intercommunication of the multitudes of people assembled within cities and towns. New and improved methods of travel, devised to meet the

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growing demands of increased population and suburban life, are within the original general purpose for which streets were created.

Electric street railways, constructed and operated as stated, are but a modern and improved use of the streets as public ways, affording, without considerable public inconvenience or obstruction of other proper use of the streets, the facilities for cheap, rapid, reliable, and convenient transportation, so essential to the population of large cities and their suburban additions. The growth and extension of cities must have been contemplated when the streets were established. Such use of the streets, whether new or old, as would best accommodate the increased population, must have been likewise contemplated. That the electric railways use the streets only by statutory permission or regulation, cannot affect the question, as the Legislature may undoubtedly regulate the ordinary use of streets. The objections urged against the electric railway would exclude the horse car and the cable car ; and the result would be to magnify the abutter's insignificant interest in the fee into an importance and value never contemplated by either party, and to subject the public to the burden and inconvenience of making new condemnations of the fee upon the introduction of any new and improved method of using the streets. We hold the electric street railway a legitimate use of the street within the original general purpose of dedication ; and therefore an ordinary use. This seems to have been the common understanding hitherto of the Legislature, the street railway companies, the general public, and the legal profession. We do not hold, and must not be understood as holding, that the electric railway companies may, without making compensation, accompany such ordinary use of the streets with such extraordinary incidents as impose new or additional burdens upon properties outside the streets that were not, and could not have been, contemplated and compensated for in the original taking. The differences between a dummy line and an electric street railway are so palpable as to require no enumeration.

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Judges WILKES and BRIGHT do not concur in the conclusion that electric street railways are an ordinary use of the streets.

By whose negligence or fault has plaintiff sustained the loss under consideration? Clearly, upon the facts as found by the majority, the loss caused by conflict of poles and wires is imputable to defendant's fault or want of care. Having power to have avoided this conflict without injury to its plant, it was defendant's duty to do so. The conflict was the result of defendant's unnecessary act. On the other hand, the loss by induction cannot be imputed to any fault or negligence of defendant. Its plant was, as regards this matter, properly constructed and operated. Defendant could not obviate induction without abandoning the streets where it occurred. Induction is such obstruction of the streets as plaintiff is forbidden to create.

The objection that induction is not an obstruction of the streets "sticks in the bark." True, it did not arrest the construction and operation of defendant's plant, but that results not for the reason that induction is not an obstruction, but because defendant was sufficiently powerful to disregard and override it.

A child, upon defendant's track, in front of its moving car, is not, in a strict sense, an obstruction, but who will say that the fact does not seriously interfere with defendant's free and unembarrassed use of the street. The constraint caused by liability for legal penalties, if the child is crushed, operates as a very substantial obstruction. Defendant must stop the car, or incur serious liability. It is in vain to say that induction is not an obstruction, if defendant shall be held for the unavoidable damage caused by it. It is true, induction implies no physical contact of the two plants, but it is a direct and immediate result of plaintiff's use and occupation of the streets. The presence and position of plaintiff's poles and wires upon the streets cause induction, and their removal would obviate it. The plaintiff cannot recover for the loss sustained from induc-

franchises for the benefit of the street railways, it would have found expression by positive enactment. It cannot be admitted by implication upon this record.

There is no necessary conflict between the rights and franchises of these companies. There is not any unavoidable repugnancy between the statutes upon which they respectively rely. The electric railway plant can be operated, under proper limitations as to distance and apparatus, without causing injury to telephone plants by conduction. This fulfils defendant's grant without trenching upon the pre-existing rights of plaintiff. If defendant seeks to have a more beneficial use of its plant by an invasion or use of plaintiff's property, it is just that compensation should be made.

Our conclusion is that plaintiff's rights have not been abridged or revoked by the acts of 1887 and 1889, but remain precisely as they were before the passage of these statutes.

It should be observed, in this connection, that the injury caused by conduction is not such necessary incident to the ordinary use of the streets as to have been contemplated and compensated for in the original taking for street uses. It is not necessarily, or even ordinarily, inflicted upon abutters, but extends to many properties, on either side, that have not been taken or subjected to any burden for street uses.

This brings us to the consideration of a novel and very important question. It is insisted by defendant that plaintiff cannot recover the damages caused by conduction, except on the theory that it has the right to the exclusive use of the whole earth for electric purposes. A monopoly of the earth's use for any purpose, or by any person, is, of course, inadmissible. The plaintiff, however, repudiates this ambitious and extravagant claim, and insists that its demand is the more modest and reasonable one for the exclusive use of electricity upon its own premises, in an authorized and non-hurtful manner, without injurious disturbance from non-natural electric conditions caused by the defendant's acts.

To recall the pertinent facts : The plaintiff had, by public authority and permission, erected and equipped its telephone plant upon an approved plan, and put it into successful operation, grounding its wires upon the property of itself and subscribers, and using the earth as a "return circuit," in accordance with the universal practice of half a century in like enterprises. Afterwards, defendant, by like permission, began the operation of a "single trolley" electric railway plant, using the earth as its "return circuit." The defendant's plant was placed in such proximity to plaintiff's pre-existing plant as to cause injury to the latter by conduction. The operation of plaintiff's plant caused no injurious disturbance of natural electric conditions anywhere.

In the operation of defendant's plant large and turbulent artificial currents of the electrical fluid were generated and poured into the streets beyond defendant's control. These currents, following a natural law, left the streets and overflowed private property for half a mile on either side. It was upon the private property of plaintiff and its subscribers, and not elsewhere, that these abnormal electric currents found and ascended plaintiff's ground wires and throttled its plant. The injury by conduction can be obviated at an expense which entails no great hardship upon either party.

We think, upon these facts, that plaintiff has the right to the protection of the courts in the enjoyment of its property. Franchises, easements, and the ability to use property, though intangible, have value, and are, equally with tangible property, entitled to the recognition and protection of the courts. If plaintiff's claim, that contemplates no more than a lawful and non-hurtful use of its own property, shall be characterized as a demand for the monopoly of the whole earth, what shall be said of defendant's larger demand for a hurtful use not only of the streets, but of private property for half a mile on either side? The plaintiff's request is: "Let me alone in that use or application of electricity upon my own premises, that causes no harm or disturbance to any one anywhere." The defendant's

command is : "Get out of my way !" to all feeble electrical enterprises that may have the misfortune to come within the range of its power.

The plaintiff proposes an adjustment of conflicting claims with defendant by the rule embodied in the enlightened maxim, *sic utere*, etc., while defendant insists upon the application of that ruder maxim, "might makes right." If defendant could succeed in its contention, there can be little doubt that the unjust rule thus established would some day "return to plague the inventor." What protection has this defendant in the enjoyment of its vast properties, if it can be deprived of the power to operate them by some younger, but more robust, child of invention that shall hereafter obtain mastery in the electric world? Is not the non-injurious use of electricity the only safe and just basis for the adjustment of the conflicting claims of electrical inventions and enterprises? What different basis than this can be arbitrarily established? Where shall the line be drawn between those electrical enterprises that must take care of the artificial currents of electricity generated by them, and those that shall not be required to do so.

To concede defendant's claim is to give to it a hurtful use of plaintiff's property, and at the same time to deny plaintiff the harmless use of its own. The argument that assumes that plaintiff is claiming the whole earth as a return circuit, and therefore appropriating a common right to its exclusive use, because "plaintiff's portion of the earth cannot be isolated and separated electrically from the balance of the earth," is one which, if pressed to its logical results, would work a revolution in the law as to the use of the earth, the water, and the air. How, if this argument be sound, can any one insist that the air and water, that, by the operation of natural law, visit his premises and support, life, shall not be rendered noisome and impure by the injurious acts of his neighbor? It is impossible that his portion of the air or water can, in advance, be "isolated and separated from the balance." Is not the right to the

use of air and water as "common" as that to use electricity? If the right to the non-hurtful use upon one's own premises, without injurious disturbance from others, of air or water or electricity, is made to depend upon his ability to isolate and separate, in advance, his portion of these elements from the "balance," that right resolves itself into an "airy nothing."

The suggestion that plaintiff, in using the earth as its "return circuit," appropriates and uses electrically the properties intervening between its "exchange" and its subscribers' station in any other than a lawful manner, is, as we think, based upon a misconception.

The plaintiff's use of electricity causes no disturbance electrically upon these intervening properties or elsewhere, and affords no inducing cause, there or elsewhere, for the invasion of its property by defendant's artificial electrical currents.

The plaintiff uses the intervening or other outside properties for electrical purposes in no other sense than it uses abutting lands as a part of the frame-work of the earth to support its own; or uses the channel of the stream upon adjoining lands that conveys the water, by natural flow, to its own; or uses the law of gravitation that causes the water to flow towards its land instead of in an opposite direction. The plaintiff does not assert the right to an injurious use of electricity, even upon its own premises.

The doctrine that reason sanctions and justice approves, as it appears to us, is that the lawful, harmless, and accustomed use upon one's land, alike of water, air, or electricity, cannot be lawfully obstructed or impaired by the injurious act of another, attended with such disturbance of natural existing conditions, and consequent loss, as that caused by conduction in this case, especially when the party performing the injurious act had the power to obviate and remedy the injury or loss, without greater sacrifice, comparatively, than is required of defendant in this case to remedy conduction.

It is not material that the injurious act is done upon the

premises of one other than the injured party—as, if the channel of a stream is cut upon adjoining lands, and the water diverted, or the waters are there arrested in their regular flow and then turned loose in flooding quantities.

To sustain plaintiff's claim accords with the analogies of the law, as will appear from the following cases :

A manufacturer of cocoa matting used a delicate chemical to bleach his matting, which was then hung out on his own land in the air to dry. Another manufacturer made sulphate of ammonia, and the vapors escaping in the air combined with the bleacher's chemicals and blacked his mats. It was shown that if the cocoa mat-maker had used another chemical just as good, or better, his mats would not have been affected. But it was held that he had the right to use any chemical [he pleased] which would not hurt anybody else, and that he had the right to have the air come to his lands pure and untainted. *Cooke v. Forbes*, L. R., 5 Eq. Cas. 166.

A manufacturer discharged the refuse from his works into a surface stream. It corroded the boilers of another factory below, which used water from the stream for steam purposes. The upper manufacturer was enjoined. *Merrifield v. Lombard*, 13 Allen, 16 (S. C., 90 Am. Dec., 172).

A manufactory of copper in one case, and of lead in another, gave off vapors, which were carried by the winds upon the lands of another, and injured growing crops, fruit trees, and flowers. They had to close down. *St. Helens Smelting Co. v. Tipping*, 11 House of Lords Cas. 642 ; *App. of Penn. Land Co.*, 96 Penn. St. 116 (S. C., 42 Am. Rep. 534).

A brewer bored a deep well and got water for use in making his ale. There was no running stream below. His neighbor had a similiar well, but used it as a sink. The sewage percolated the brewer's land, and polluted the water so it could not be used in making ale. The brewer was protected in the use of his well. *Ballard v. Tomlinson*, L. R., 29 Ch. Div., 115 (S. C., 24 Am. Law Reg., 634).

The Standard Oil Company stored oil in its warehouse. The oil barrels leaked. This leakage, soaking into the

earth, percolated Mr. Kinnaird's land, and ruined his spring. It was held the company had no right to thus use its property. *Kinnaird v. Standard Oil Co.*, 89 Ky. (S. C., 25 Am. St. 545).

A silk-maker required water of great softness and purity to wash and dye his silks. He got it out of the "Charnot."

A public water company built a reservoir above, and so collected the water that when it was discharged, the purity of the water was affected. The company had to quit. *Clines v. Staffordshire, etc. Co.*, L. R., 8 Ch. App. Cas. 126; Gould on Waters, sec. 219; *Acquaenock Water Co. v. Watson*, 29 N. J. Eq. 372.

Although the precise question determined in this case has not hitherto been necessarily involved in the decision of any case, it has, nevertheless, been considered by some of the courts.

In *Hudson River Tel. Co. v. Watervliet T. & R. R. Co.*, 52 N. E. Rep., decided in 1892, the Court of Appeals of the State of New York expressed its views as follows:

"The defendant insists that it has an equal right with plaintiff to make use of this property, or law of nature, in the conduct of its business, just as all are entitled to the common use of the air and the light of the heavens, which, in a certain sense, is undoubtedly true. But the defendant does something more. It does not leave the natural forces of matter free to act, unaffected by any interference on its part. It generates and accumulates electricity in large and turbulent quantities, and then allows it to escape upon the premises occupied by the plaintiff, to its damage.

"We are not prepared to hold that a person, even in the prosecution of a lawful trade or business upon his own land, can gather there, by artificial means, a natural element like electricity, and discharge it in such volume that, owing to the conductive properties of the earth, it will be conveyed upon the grounds of his neighbor with such force and to such an extent as to break up his business or impair the value of his property, and not be held responsible for the resulting injury. The possibilities of the manifold

industrial and commercial uses to which electricity may eventually be adopted, and which are even now foreshadowed by the achievements of science, are so great as to lead us to hesitate before declaring an exemption from liability in such a case. It is difficult to see how responsibility is diminished or avoided because the actor is aided in the accomplishment of the result by a natural law. It is not the operation of the law to which plaintiff objects, but the projection upon its premises, by unnatural and artificial causes, of an electric current in such a manner, and with such intensity, as to materially injure its property. It cannot be questioned that one has the right to accumulate water upon his own real property, and use it for a motive power; but he cannot discharge it there in such quantities that, by the action of physical forces, it will inundate his neighbor's lands and destroy his property, and shield himself from liability by the plea that it was not his act, but an inexorable law of nature, that caused the damage. Except where the franchise is to be exercised for the benefit of the public, the corporate character of the aggressor can make no difference. The legislative authority is required to enable it to do business in its corporate form; but such authority carries with it no lawful right to do an act which would be a trespass if done by a private person conducting a like business. If either collects, for pleasure or profit, the subtle and impalpable electric fluid, there would seem to be no great hardship in imposing upon it, or him, the same duty which is exacted of the owner of the accumulated water-power—that of providing artificial conduit for the artificial produce, if necessary, to prevent injury to others.”

The opinion of the Supreme Court of New York was to the same effect.

An English judge, in a recent case, has thus stated his views :

“But, after reflecting much on the merits of the case, on the argument addressed to me, and on the peculiarity of an electric current as distinguished from every other power,

I fail to see any reason why the principle should not be applied to it. I cannot see my way to hold that a man who has created — or, if that be inaccurate, called into special existence — an electric current for his own purposes, and who discharges it into the earth beyond his control, is not as responsible for damages which that current does to his neighbor as he would have been if, instead, he had discharged a stream of water. The electric current may be more erratic than water, and it may be more difficult to calculate or to control its direction or force, but, when once it is established that the particular current is the creation of, or owes its special existence to, the defendant, and is discharged by him, I hold that if it finds its way onto his neighbor's land, and there damages the neighbor, the latter has a cause of action." *Nat. Tel. Co. v. Baker*, L. R. (1893), 2 Ch. 186.

The same doctrine was maintained by Judge TART, then judge of the Superior Court of Cincinnati, and now a justice of the Federal Circuit Court of Appeals, in the case of the *City and Suburban Tel. Ass. v. The Cincinnati Inclined Plane Railway Company*.

The injury by conduction constitutes such invasion or taking of plaintiff's property as renders defendant liable for the damage done. It is a direct and immediate result of defendant's injurious act. It imposes a burden upon plaintiff's property that impairs its use and value. The loss is fixed and definite in amount. It can make no difference that no material thing was taken, or that the loss resulted, not from contact of material things, but through the agency of the subtle and impalpable electric fluid.

The important consideration is that a thing of value has been taken from plaintiff for the benefit of defendant as the representative of the public, and for that thing compensation must be made. It is a plain dictate of justice that the public, not the individual citizen, should leave the burdens imposed upon private property for the public benefit. That defendant's act may have been authorized and lawful can make no difference. The Legislature has

not the power (except, perhaps, as to corporate franchises) to authorize, and in this case it has not undertaken to authorize, the taking of private property for a public use without compensation.

Says Mr. Taylor on Corporations: "To constitute a taking of property, it is not necessary that any *material* thing be actually taken; it is enough if any *right* of the owner respecting the thing owned be impaired, so that he cannot apply the thing to all the uses of which it was formerly capable. The Legislature cannot authorize either a direct or a consequential taking or *injury* to property without compensation; and if a corporation voluntarily, for its own benefit, so constructs a work as necessarily to injure the property (*i. e.*, the thing owned) of an individual, or deprive him of any right he may possess regarding the thing which he owns, or his rights therein, it will be bound to compensate him for his damages, even though the work be properly and lawfully constructed." Taylor on Corp., secs. 173, 473, and numerous cases cited.

Mr. Lewis, in his late exhaustive work on Eminent Domain, sums up the doctrine in these words: "What possible distinction can there be between the actual taking of my property, or any part of it, and occupying it for the erection of a railroad track, or a gas-house, and *invading* it by an *agency* that *operates* as an actual abridgement of its beneficial use, and possibly a complete and practical ouster? (Sec. 152.)

An act which authorizes a particular business at a particular place, which necessarily defiled the air so as to create a nuisance, would be void, and unless it was for public use—such as manufacturing gas for a city—would be subject to the constitutional limitations of making compensation." Lewis on Emi. Dom., Sec. 152; and see *Ib.* Secs. 149, 55, 57.

Says Mr. Wood, in his work on Nuisances: "Whenever the exercise of the right (asserted) operates to destroy an *easement* incident to real property or *amounts* to an actual physical invasion, of property by some *agency* that pro-

duces injury thereto, or imposes a *burden* thereon, this is a taking of property." Sec. 762.

And, further: "The Legislature cannot confer upon a corporation the right to do any act that imposes a burden upon the property of others, that amounts to an actual taking of property for public purposes, so as to exempt such corporation from liability for all damages that result from the exercise of their franchise, that, in law, amounts to a taking of property." Wood on Nuisance, sec. 759. See, also, *Gay v. Knoxville*, 85 Tenn. 92; *Street Ry. Co. v. Doyle*, 88 Tenn. 747; *Myers v. St. Louis*, 82 Mo. 378; *Abendarth v. Manhattan Ry.* (N. Y.), 19 Am. St. Rep. 461.

The injury by conduction does not belong to that class of "consequential injuries" or "inconveniences" which, it is said, must be borne in ordinary cases without compensation, as the penalty and price of living in cities and enjoying the conveniences and comforts of civilized life. These are usually of such character as to affect the community generally, and are, therefore, in a sense, borne by the public. The damages thereby inflicted are, moreover, not of easy and satisfactory computation.

Here the injury is the direct result of an injurious act, and of a graver character than a mere inconvenience. It affects a single person seriously, and the community only incidentally; the loss inflicted is definite in amount.

We respectfully dissent from the view expressed by Judge BROWN, in the injunction case between these companies, where he classes this injury with the inconveniences that result from "the smoke that fills our lungs and soils our garments; the dust that enters our dwellings and stores and damages our furniture; the noxious odors that assault our nostrils; the impure water we are sometimes compelled to drink," which, he says, "are the necessary penalties we pay for living in cities, but in ordinary cases there is no legal remedy for the evil." *Cumberland Tel. & Teleph. Co. v. United Elec. Ry. Co.*, 42 Fed. Rep. This is not in our opinion, an ordinary case, in which compensation

should be denied, even if it is classed as an "inconvenience" or "consequential injury."

It has been suggested that the electric railway companies may be subjected to multiplicity of suits under this decision. That may be inconvenient and expensive for the railway companies, but it constitutes no defense to their liability for the value of private property taken for their use. Besides, the inconvenience is not all on one side. It might prove equally inconvenient for the citizen to have his right to maintain a telephone at his home or place of business placed at the mercy of the electric railway companies.

One question remains: Was it plaintiff's legal duty, upon the institution of defendant's electric system, to protect itself against the injurious consequences by making, at its own ultimate cost, such changes in its pre-existing plant as would obviate the effects of conduction—*e. g.* by putting in the "McLeuer device?"

We answer this question in the negative. The defendant must take care of the natural and reasonable consequences of its own act. The plaintiff, being in the lawful possession and enjoyment of its own property, was under no obligation to take notice of defendant's approach, or to get out of its path.

Judge BROWN says, in his opinion in the injunction case: "If, in the case under consideration, it were shown that the double trolley would obviate the injury to complainant without exposing the defendants or the public to any great inconvenience or a large expense, we think it would be their duty to make use of it, and should have no doubt of our power to aid the complainant by an injunction."

This is correct as regards the application for an injunction, but, if it is to be understood as holding that defendant would not be liable for the loss by conduction if plaintiff could apply the cheaper remedy, then we dissent from the view expressed. The plaintiff can only recover such loss as necessarily resulted to it from defendant's act. It must use due diligence to prevent unnecessary loss. The fact that plaintiff could apply the cheaper remedy would affect

the amount of its recovery, but not the fact of defendant's liability. The right of the owner to compensation for his property taken for public use does not depend upon any consideration of this sort.

We have been referred to some cases that maintain views in apparent conflict with those expressed herein. It is sufficient to say of these cases that the New York and Ohio cases were decided chiefly upon consideration of particular statutes. *Railway Co. v. Tel. Ass.*, 48 Ohio, 390. They were, without exception, injunction cases, in which the telephone companies appeared at great disadvantage, as seeking to obstruct the path of progress, and to debar the public of a great convenience. In that contest, the telephone companies sought to take the lives of the electric railway companies. Here the question is one of liability for a sum that would impose no serious hardship upon either party to bear. In none of the cases was the question here decided necessarily involved. It was discussed, however, by some of the courts. It was perfectly clear in the injunction cases that the telephone companies were not threatened with irreparable injury. They had an adequate remedy by suit at law for damages. On the other hand, to have enjoined the railway companies would have inflicted irreparable injury upon them and the public.

As the result upon the whole case, the judgment below is affirmed as to the loss by induction, and reversed in all other respects. And upon the written stipulation of the parties that final judgment shall be entered here, there will be entered in this court judgment in favor of plaintiff and against defendant for \$3,660.58 for loss by conduction, and \$816 for loss by conflict of poles and wires, with interest from date when expended, and all costs of this cause.

Judge CALDWELL concurs in the result of this opinion on the question of conflict of poles and wires, and on the question of induction, but does not agree on the question of conduction.

WILKES and SNODGRASS, JJ., wrote dissenting opinions.

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NOTE.— See note to preceding case.

The case having the same title as this, reported in vol. 8 of this series, at page 408, was brought in the United States Circuit Court to obtain an injunction. The telephone company, having been defeated in that suit, took such steps as were necessary to overcome the dangers, and brought this action in the State court to recover the cost of such work.

The following is the statement of facts and opinion, in full, in the case of *National Telephone Company v. Baker*, Law Reports, 2 Chancery Division (England), page 186, decided in 1893, and cited in the foregoing opinion:

“ This action was brought by the *National Telephone Company, Limited*, and by *Charles Lupton*, one of their telephone exchange subscribers at *Leeds*, to restrain the defendant from so working his electric tramway as to occasion a nuisance to the plaintiffs' telephone lines, and for damages.

“ The plaintiff company carried on an extensive business throughout the United Kingdom, under license from the postmaster-general for a term of years, in supplying telephonic communication, principally by what was called the ‘ telephone exchange ’ system. The system was worked on what was known as the ‘ single wire ’ system, the electric circuit being completed by the earth—that is, each end of the wire passed into the earth, which thus acted as a return conductor.

“ The company's exchange at *Leeds* had been in operation since 1880, and there were now 1,200 subscribers and separate wires.

“ By a provisional order called the *Leeds* corporation tramways order, 1888, confirmed by the *Tramways Orders Confirmation (No. 1) Act*, 1888, the provisions of the *Lands Clauses Acts* (except with respect to the purchase and taking of lands otherwise than by agreement, and with respect to the entry upon lands by the promoters of the undertaking), and of the *Tramways Act*, 1870, were (sec. 2) incorporated with that order, except where expressly varied. By sec. 6 the corporation of *Leeds*, therein called ‘ the promoters, ’ were authorized to construct certain specified tramways with all proper rails, works and conveniences.

“ Sec. 16 was as follows: ‘ The carriages used on the tramways may, subject to the provisions of this order, be moved by animal power, and, with the consent of the board of trade, to be signified in writing, during a period of seven years after the opening of the same for public traffic, by means of haulage with wire ropes or other appliances placed underground, or by means of electric power, pneumatic power, and steam power, or any mechanical power, and with the like consent during such further periods of seven years as the said board may from time to time specify in any order to be signed by a secretary or assistant secretary of the said board, by means of any such motive, drawing, or propelling power as aforesaid; ’ with a proviso that the use of any power other than animal power should be subject to the regulations in schedule A to the order (that schedule dealing with the break power and fittings of engines, safety of carriages, inspection of engines and carriages, and speed), ‘ and to any regulations which may be added thereto or substituted therefor respectively by any

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order which the board of trade may and which they are hereby empowered to make from time to time as and when they may think fit for securing to the public all reasonable protection against danger in the exercise of the powers by this order conferred with respect to the use on the tramways of any such power as aforesaid other than animal power.'

"Sec. 51 enacted that, in the event of any tramways of the promoters being worked by 'electricity it shall not be lawful for the promoters to lay down any line or rail, or to do any act or work for working such tramways by electricity, whereby any telegraphic line of the postmaster-general is or may be injuriously affected;' the section going on to provide for notice being given to the postmaster-general of any work to be done within ten yards of any telegraph line. And the section contained the following sub-section: '(5) For the purposes of this section a telegraphic line of the postmaster-general shall be deemed to be injuriously affected by any act or work if telegraphic communication by means of such line is, whether through induction or otherwise, in any manner affected by such act or work or by any use made of such work.'

"By the *Telegraph Act*, 1878, sec. 2, the expression 'telegraphic line' includes anything whatsoever used for maintaining telegraphic communication.

"Under their provisional order the corporation constructed a line of tramway from *Roundhay Park* into *Leeds*, consisting of two miles of double line along the *Roundhay road*, and a mile and a half of single line along the *Harehills road*, and *Beckett street* within the borough. This line of tramway was opened for traffic on the 29th of October, 1891. It was worked by the defendant *William Sebastian Graff Baker*, a contractor or engineer employed by the *Thompson-Houston International Electric Company*, under an agreement between himself and the corporation, dated the 6th of May, 1891, by the terms of which he undertook, for a limited period and paying a certain rental, to provide the cars, rolling stock, and plant necessary for working the tramways on the system of electrical traction adopted by the *Thompson-Houston International Electric Company*, the defendant being responsible for all damage arising out of accidents or injuries in consequence of the working of the tramway, and the corporation undertaking to keep the tramway itself in repair. The written consent of the board of trade to the use of electrical power on the tramway for seven years was given on the 15th of December, 1891; but this consent did not specify the particular method to be used. The *Thompson-Houston* system of electrical motive power adopted by the defendant was what was commonly known as the 'single-trolley system' which consisted of a single overhead conducting wire connected with the tram car by a trolley and line carrying the electric current to the car, which current operated a motor or motors on the car causing it to travel, the current returning by the rails and by an uninsulated copper conductor running under the roadway parallel to the rails and connected with each rail.

"The plaintiffs complained that the effect of the working of the tram-

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way to cause such an electrical disturbance to the plaintiff company's telephone lines as to render them practically useless ; and they accordingly issued the writ in this action for an injunction to restrain the defendant from using the said tramway, or any other tramways in the borough of Leeds, in such a manner as to occasion a nuisance to the plaintiffs as owners or users of telephone lines and electric circuits within the borough or as the owners or users of the telephone exchange system established in the borough, or in such a manner as to injure, disturb, or interfere with the property or business of the plaintiffs.

"In their statement of claim the plaintiffs' alleged that the effect of the working of the tramway was to interfere with and disturb the plaintiffs' electric circuits, and to render the wires owned or used by the plaintiffs in the neighborhood of the tramway useless for telephonic communication, and so constituted an intolerable nuisance to the plaintiffs and to the subscribers of the plaintiff company ; and that unless such nuisance was forthwith abated the business of the company in *Leeds* would be seriously damaged, and the use and enjoyment of the plaintiff *Lupton* of the wire rented by him entirely destroyed ; that the electrical disturbance caused by the defendant's system could be readily prevented by the adoption by him of a different method of completing the electric circuit from his cars to the generating station in *Harehills road*. The plaintiffs further allege that the defendant was intending to extend the tramway through to *Leeds*, and that if such intention were carried out, the plaintiff company's exchange system in the borough would be destroyed.

"In his statement of defence the defendant alleged that the tramway had been constructed under the statutory authority above mentioned ; he also pleaded the agreement and the consent of the board of trade, under which agreement and consent he was working the tramway, and denied the alleged electrical disturbance ; and he contended that, even if there was such a disturbance, it did not infringe any right of the plaintiffs and could not be prevented by the adoption of a different method of completing the electric circuit from the cars to the generating station ; that the plaintiffs could easily obviate such alleged electrical disturbance by the adoption of some other method of completing their electric circuit than by the earth return adopted by them. The defendant also denied the alleged nuisance.

"In their reply, the plaintiffs denied that the agreement of the 6th of May, 1891, authorized the defendant to work the tramways in the manner in which they were being worked ; or that such working was authorized by any provisional order or consent of the board of trade.

"After the action had been set down for trial, his lordship, with the consent of both parties, directed Mr. *Macrory*, Q. C., to proceed to *Leeds* to ascertain by inquiry and experiment, in the presence of representatives on each side and to report to the court, how far, if at all, the plaintiffs' telephonic system had been interfered with by the defendant's tramways, with liberty to employ an assistant.

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“Mr. *Macrory* accordingly visited *Leeds* in company with Mr. *Henry H. Cunynghame*, barrister at law, as his assistant, and conducted a series of experiments there in the presence of representatives from both sides; and he ultimately presented a written report, dated the 11th of January, 1893, which, after detailing the experiments by means of which, he said, he had been enabled to form a decided and accurate judgment on the question, concluded thus: “I report as follows. That the plaintiffs’ telephone system is seriously interfered with by the works of the defendant. In some cases the disturbance is so great as to render speech quite inaudible. By ‘inaudible’ I mean that, though the sound of the speaker’s voice may be heard, the words being transmitted are entirely unintelligible. In other cases speech was to some extent audible, but an effort on the part of the listener was required to distinguish the words being transmitted; and there cannot be a doubt but that the effect produced by the working of the defendant’s tram-cars and line is such as greatly to interfere with the efficiency of the telephone by creating noise which in all cases impairs, and in some cases entirely destroys, the power of transmitting speech.” The disturbances were stated to consist sometimes of a buzzing or whirring noise; sometimes the noise assumed a uniform character like the rushing of water from a tap; while at other times it was similar to a musical note rising or falling, or to the sighing of the wind through trees.

“The action now came on for trial.

“Several English and American electricians of eminence were called as witnesses on both sides. The merits of the various systems of supplying electrical power for tramway purposes were fully discussed by different witnesses, the weight of evidence being, as his Lordship held, in favor of the defendant’s system, which had stood the test of considerable experience in the United States of America. Upon the question of the use by the plaintiffs of the ordinary ‘earth return’ for their telephonic system, it clearly appeared from the evidence on both sides that the use of a ‘metallic return,’ that is, of a second wire, unconnected with earth, to carry the current back, would afford a complete cure for the disturbance complained of, though it was proved that nearly the whole of the plaintiff company’s telephone business throughout the country was carried on by means of the single wire system.

“Sir *R. Webster*, Q. C., *Moulton*, Q. C., *Warmington*, Q. C., *Micklem*, and *R. W. Wallace*, for the plaintiffs.

“Sir *J. Rigby*, S. G., *Bonsfield*, Q. C., and *Dunham*, for the defendant.

“Solicitors: *Waterhouse*, *Winterbotham*, *Harrison*, & *Harper*, C. *Leighton*.

“*KEKEWICH*, J.: As between the *National Telephone Company*, whom I shall treat as the sole plaintiffs, although another is associated with them, and the *Leeds* corporation, whom I shall treat as the real defendants, although not appearing on the record, there is no question of title, and no question but that each is lawfully exercising undoubted

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rights; nor is there any question but that the acts of the defendants interfere with the exercise by the plaintiffs of their lawful rights. This would, I think, have been undoubtedly true if the case had been threshed out in the evidence without the advantage of Mr. *Macrory's* report; but that report renders it unnecessary to deal with the evidence on this point; and the interference is of a serious character, so that, if actionable, the remedy would properly be by injunction rather than by damages. The real and only question in the case is whether the interference is actionable. It was practically admitted by the plaintiffs, and my own view certainly is, that if they can maintain the action against the defendants at all, it must be on the application of the principle now well known as that of *Fletcher v. Rylands*, Law Rep. 1 Ex. 265 (3 H. L. 330.) That principle, for the purpose of application to the case in hand, may conveniently be stated by reference to the second of four propositions set out in the 5th chapter of Mr. *Garrett's* book on the Law of Nuisance, which I have consulted in connection with more than one point in this case, and gladly take this opportunity of mentioning as a work of uncommon merit. I will read the proposition in the author's own words, but think it capable of improvement by the substitution for 'non-natural' of 'extraordinary,' which is the term employed by Lord *Kingsdown* in defining somewhat analogous water rights in his well-known judgment in *Miner v. Gilmour*, 12 Moo. P. C. 181. The proposition is thus stated by Mr. *Garrett* (page 117): 'If the owner of land uses it for any purpose which from its character may be called non-natural user, such as for example the introduction on to the land of something which in the natural condition of the land is not upon it, he does so at his peril, and is liable if sensible damage results to his neighbor's land, or if the latter's legitimate enjoyment of his land is thereby materially curtailed.'

"The land into which the plaintiffs and defendants alike discharge their electric current does not belong to either of them; but, for the reasons above indicated, there cannot, as between them, be any question that the principle ought to be applied, if it be applicable at all, on the basis of their being absolute owners. That principle has never yet been applied in English law to such a matter as is now under consideration; and perhaps it would not be too much to say that those who enunciated the law in *Fletcher v. Rylands*, Law Rep, 3 H. L. 330, and have commented on and followed it in other cases, never had present to their minds the application of the doctrine to an electric current and the possible consequences of its discharge into the earth.

"The question has been carefully considered in *America*, and I have studied with deep interest the case of *Cumberland Telephone and Telegraph Company v. United Electric Railway*, 42 Federal Reporter, 273. The judgment of the court in that case, though in no wise binding on me, has commanded my earnest attention and respect, and, but for one circumstance, I should not hesitate to allow my own conclusion to be guided by the powerful arguments there set forth. That one circumstance is the want of full adoption of the principle of *Fletcher v. Rylands*. American

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law apparently holds the owner of land used for a non-natural or extraordinary purpose responsible for the consequences of such user to his neighbor only when they result from that owner's negligence; and if he can satisfy the court that he has not been guilty of negligence, the resulting damage to his neighbor is not actionable. It seems to me that if the principle of *Fletcher v. Rylands* had been fully adopted in America, the conclusion of the court in the case just cited must have been different. I believe that in Scotland, too, the principle of *Fletcher v. Rylands* has not been accepted, and is not regarded as consistent with justice between man and man. It does not fall to me to consider so large a proposition. The principle is thoroughly well settled here, and my duty is merely to consider whether it is applicable. It would be easy, of course, to point out differences between all the cases to which it has hitherto been applied and the present; and I have already said that injury arising from such a case as the discharge of electric current can scarcely have been contemplated by any judge in previous cases. But after reflecting much on the novelty of the case, on the argument addressed to me, and on the peculiarity of an electric current as distinguished from every other power, I fail to see any reason why the principle should not be applied to it. I cannot see my way to hold that a man who has created, or, if that be inaccurate, called into special existence, an electric current for his own purposes, and who discharges it into the earth beyond his control, is not as responsible for damage which that current does to his neighbour, as he would have been if instead he had discharged a stream of water. The electric current may be more erratic than water, and it may be more difficult to calculate or to control its direction or force; but when once it is established that the particular current is the creation of or owes its special existence to the defendant, and is discharged by him, I hold that if it finds its way on to a neighbour's land, and there damages the neighbor, the latter has a cause of action. At any rate, I think that if a distinction is to be taken between this and other forces for this purpose, that distinction must be made by a higher tribunal, and not by a judge of first instance. It was endeavored to be argued on behalf of the defendants, that the current injuring the plaintiffs was only part of the general body of electricity which may be now said to exist everywhere and to be proceeding in every direction; but the effect of the defendant's operation is to collect a particular portion of this body and to discharge it into the earth at a particular spot, and there can be no doubt that the disturbance of the plaintiffs' telephone system is caused by the particular quantity thus discharged.

Assuming the action to be maintainable on the principle of *Fletcher v. Rylands*, Law Rep., 3 H. L. 330, the defendants rely on two answers to the plaintiffs' claim. First, they say that the plaintiffs might by an alteration of their system, that is, by the adoption of what is known as the metallic return, prevent the disturbance complained of; and secondly, they say that they (the defendants) are acting under statutory powers, and that if in the proper exercise of those powers they injure the plaintiffs they are free

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from blame. The first answer is, to my mind, without foundation. The man who complains of his land being thrown out of cultivation by the incursion of water escaping from his 'neighbour's reservoir, must not be told that he has no right of action because if he had interposed a wall, or otherwise taken care to protect himself, the water would not have reached his land. He is using his land in a natural way, and is not bound to take extraordinary precautions, and is entitled to rely on his neighbor also using his land in a natural way, or, if he uses it otherwise, taking extraordinary precautions to prevent damage to others therefrom. There is, no doubt, a body of evidence to show that a system different from that adopted by the plaintiffs has been adopted elsewhere with advantage, and may, possibly, prove to be the most convenient though more expensive for them; but the evidence also proves that their present system has been largely adopted and is received with favor by many competent to form an opinion. It also has the merits of economy. They are carrying on their own business lawfully and in the mode which they deem best, and I cannot oblige them to change their system, because they might thereby, possibly, enable the defendants to conduct their business without the mischievous consequences now ensuing. True it is, that the analogy introduced above fails to this extent, that the plaintiffs are using the land for an extraordinary purpose; but, admittedly, it is a lawful purpose, and, though under an obligation to obviate mischief from their own operations to their neighbors, they are under none, in my judgment, to protect themselves from the defendants or others. The outflow from one reservoir might easily destroy another; but, so far as I am aware, there is no principle or authority in English law for rejecting a claim for damage by the owner of the latter on the ground that his user, as well as that of the neighboring owner, is extraordinary.

The second answer of the defendants to the plaintiffs' claim has required more examination, having recently had occasion in *Allison v. City and South London Railway Company*, *Times*, Feb. 24, 1892, and again in *Rapier v. London Tramways Company*, W. N. (1892) 165, to consider such a plea as is here put forward, and to consider many authorities, and in particular the cases of *Metropolitan Asylum District v. Hill*, 6 App. Cas. 193, and *London, Brighton and South Coast Railway Company v. Truman*, 11 App. Cas. 45, and their application to different provisions and circumstances, I do not find it necessary again to state my view of the law or of the lines by which I ought to be guided in applying it to a particular case. Therefore, I shall but briefly explain the reasons for my conclusion that the defendants' plea is good in law, and that they are not responsible to the plaintiffs for the mischief caused by their works. The defendants' authority is derived under a provisional order confirmed by act of parliament. Such provisional orders in connection with tramways and many other undertakings of a public character are now common, and, I think, must be treated as 'a well-known and recognized class of legislation' equally as much as the *Railway Acts*, which were referred to in those terms by the Lord Chancellor in *London, Brighton and South Coast Rail-*

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way Company v. Truman, 11 App. Cas. 58. The *Railway Acts* (again using the language of the Lord Chancellor in the same case) were assumed to establish the proposition that the railway might be made and used whether a nuisance were created or not; and, in my judgment, a like proposition must be assumed to be established by the provisional orders, one of which is here under consideration.

“The defendants are expressly authorized to use electrical power, and the Legislature must be taken to have contemplated it, and to have condoned by anticipation any mischief arising from the reasonable use of any such power. A distinction was endeavored to be made between cases where extraordinary powers are directly sanctioned by the Legislature, and those where it is left to some other authority (in this instance the board of trade) to determine whether, if at all, they may be brought into operation. It is within the competence of the Legislature to delegate its authority; and when once that delegated authority has been properly exercised by the agent to whom it is entrusted, the sanction is that of the Legislature itself just as much as if it had been expressed in the first instance in an act of parliament. The defendants relied on the 51st section of the provisional order. They argue that the exception there made in favor of the telegraphic—which would include telephonic—lines of the postmaster-general, indicates that interference with any other like lines was intended to be permitted. The reference supports the more general argument, and I have, therefore, mentioned it; but I rest my decision more on the established principle laid down in many of the cases, and ultimately ratified by the House of Lords in *London, Brighton and South Coast Railway Company v. Truman*, 11 App. Cas. 45.

“To this plea of statutory power the plaintiffs have a rejoinder. They say that such power cannot avail the defendants unless they have acted reasonably in the exercise thereof, and have done their best to avoid injury to their neighbors. The argument being sound in law, one is compelled to examine the facts. The defendants work their tramways on what is called the ‘single trolley system.’ There are other systems which have from time to time been used, and it seems are still in use elsewhere, and there are at least some good reasons for the conclusion that by the adoption of one or the other of these systems the defendants might wholly or partially avoid the mischief which they now occasion. There is a contest on the evidence whether any of these other systems can be regarded as good apart from comparison with that of defendants, and there is a further conflict of evidence whether, if good, they are comparable in merit with that of the defendants. My conclusion from the evidence is that the defendants’ system is, on the whole, the best which practical science has yet discovered; but there is no occasion really to go as far as this. It is enough to say, and about this I entertain no doubt, that it is at least as good as any other, and has been proved by experience, especially in the *United States*, where there have been larger opportunities for experiment and consideration, to be as likely as any other to meet the requirements of traffic and the convenience of all concerned in the protection of the site of tramways for the use of

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legitimate purposes other than those of the tramway undertaking. It cannot be that, in the application of the law which I am now considering, the court is bound to hold a railway or other company liable for the consequences of acts done under statutory powers, because it has not adopted the last inventions of ever changing, ever-advancing scientific discovery. It is surely impossible, with any regard to that common sense which after all is the foundation of this and many other branches of law, to say that a railway, which was not liable last year, last month, or even yesterday, because until then its undertaking was carried on according to rules acknowledged to be the best, is liable now—not because those rules have been proved to be altogether wrong in practice, or unscientific in principle, but because some diligent worker in this department has discovered what is held for the moment to be a large improvement but may tomorrow turn out to be only a step in the progress of further advance; and yet these might be the necessary conclusion in many cases, and indeed might be the necessary conclusion here if I were driven to support plaintiffs claim on the ground that the single trolley system, so largely approved where it has been largely tried, does not avail the defendants as a proper exercise of their statutory powers, because another system is in use and apparently successfully used at *Buda Pesth* or elsewhere. I do not wish to prejudice the question whether a charge of negligence in the exercise of statutory powers can be supported by cogent evidence that the company exercising those powers has failed to adopt alterations or precautions which sufficient experience has shown to be of large, indisputable and permanent value. That question may easily arise in many of the disputes which are likely enough from time to time to occur between public companies and those whom their operations injuriously affect, and it may even arise between the parties to this litigation; suffice it to say that it does not arise now.

“Holding, on the above grounds, that the plaintiffs cannot maintain an action either for an injunction or for damages against the defendants, I must order them to pay the general costs. If ever there has been or can be a case to which the distinction between the two scales of costs is properly applicable, this is the one, and the costs must be taxed on the higher scale. But it remains to make an exception, and that of some extent. I have already stated that the interference with the plaintiffs by the defendants is beyond doubt. I do not think that this ought to have been litigated. Mr. *Macrory's* report shows that one fair experiment would have proved the facts about which there was really very little doubt independent of his report, and that much time was uselessly spent on evidence. Not only must the plaintiffs be excused payment of the defendants' costs of this issue—which must be defined to be the issue whether the plaintiffs' telephonic system was in fact interfered with by the defendants' operations—but the costs thus excepted from the general costs of the action must be borne by the defendants and set off. Those costs will, of course, include those incurred in the experiment conducted at *Leeds* under Mr. *Macrory's* superintendence. I am glad to think that the course pursued with the concur-

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rence of both parties of sending him down to make experiments and report was not only successful in finally settling an issue of fact, but also shortened the trial, and saved the further costs which further dispute on this point would necessarily have involved.

"There will be judgment for the defendants, with costs, modified in the manner I have expressed."

**BURT, Respondent, v. THE DOUGLAS COUNTY STREET
RAILWAY COMPANY, Appellant.**

Wisconsin Supreme Court, October 25, 1892

(83 Wis. 229.)

**ELECTRIC STREET RAILWAYS — INJURY BY ELECTRIC SHOCK — NEGLIGENCE
AND CONTRIBUTORY NEGLIGENCE.**

Plaintiff, while attempting to pass from the motor car to the trailer, took hold of the iron guard rails on the platform of each car, and received an electric shock due to defective insulation.

In an action to recover for the injuries thus sustained, *held*, that the company having the means of ascertaining that electricity was escaping from the machinery in the motor car, was chargeable with knowledge that if it escaped, the platform rails were liable to become charged.

Also *held*, that the plaintiff was not guilty of contributory negligence as matter of law, in attempting to pass from one car to the other while the cars were in motion, so as to bar his recovery for the injuries sustained by electric shock, that being a danger which he was not bound to apprehend, and it being customary for conductors and passengers to do the same thing, against which there was no rule of the company.

APPEAL by defendant below from judgement of Circuit Court, Douglas county, in an action to recover damages for personal injuries.

The plaintiff boarded a motor car, to which a trailer was attached. Finding no fire in the car, he attempted, while the cars were in motion, to pass back into the trailer. To do this it was necessary to step out upon the platform, grasp the iron guard-rails or handles of both cars and step from the step of one car to that of the other.

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By reason of imperfect insulation, electricity escaped, the iron handles became heavily charged, and when plaintiff grasped both of them a circuit was completed and he received a severe shock and was severely injured.

Plaintiff was unaware of the dangerous conditions.

On the trial the jury found specially that the cars in which the plaintiff was a passenger were out of repair, in that the electricity was allowed to escape from its proper channel to the handles which the plaintiff took hold of in attempting to pass from one car to the other; that the company was guilty of negligence in allowing its cars and electrical appliances to remain in that condition; that such negligence was the proximate cause of the plaintiff's injuries; and that plaintiff was not guilty of any negligence which contributed to such injuries. The jury also assessed plaintiff's damages at \$1,500.

A motion on behalf of defendant for a new trial was denied, and judgment entered for plaintiff pursuant to the verdict. The defendant appeals from the judgment.

F. G. Wixon, attorney, and *Ross, Dwyer, Smith, Hanitch & Douglas*, of counsel, for the appellant.

Knowles, Dickinson, Buchanan, Graham & Wilson, for the respondent.

LYON, C. J.: The learned counsel for the defendant company made the point in his argument that the company had no notice or knowledge of the peril that a person passing from one car to another, in the manner the plaintiff attempted so to pass, might receive an electric shock. He argues therefrom that the company is not liable in this action.

We think the point is not well taken. The company was chargeable with notice that the electrical apparatus on its cars was in a defective condition, for it appears that it had the means of readily ascertaining whether any electricity was escaping from the machine and works in the body of

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the car ; and knowledge must be imputed to the company that if it escaped, the iron handles of the platform were liable to become charged therewith.

The only other question argued in the case is whether the evidence conclusively proves that the attempt of the plaintiff to pass from one car to the other when the cars were in motion, in the manner he did, was negligence on his part which contributed directly to the injury of which he complains. Or, stated in another form, was it error for the trial court to submit the question of contributory negligence to the jury ? The testimony tends to prove that the company had no rule prohibiting passengers from stepping from the platform of one car to the platform of the other when the cars were in motion, and had never given any caution against the practice ; that before plaintiff was injured, passengers on those cars, among whom was the plaintiff, frequently did so without objection on the part of the company, and that the car conductors constantly passed from one car to another, when the same were in motion, in the same manner. Moreover, while it may reasonably be claimed that in thus passing from one car to another there was some peril of being thrown from and under the cars, there was no apparent reason to apprehend, and the plaintiff did not apprehend, the presence of any peril that by so doing he would come in contact with a current of electricity. Under these circumstances, we cannot say that contributory negligence on the part of plaintiff was conclusively proved.

Hence it was not error to submit that question to the jury.

By the Court. — The judgment of the Circuit Court is affirmed.

NOTE.—See note to next case ; also note to *Clements v. La. Elec. Lt. Co.*, *post*.

**THE DENVER TRAMWAY COMPANY, Appellant, v.
WILLIAM REID, Appellee.**

Colorado Court of Appeals, Oct. 9, 1893.

(4 Col. Court of Appeals, 53.)

**ELECTRIC STREET RAILWAY.—MEASURE OF DUTY.—INJURY BY SHOCK.—
EVIDENCE.**

A street railway company operating its cars by means of electricity is bound to use extraordinary care and is liable for slight negligence.

Proof that an electric street car was so charged with electricity as to injure a person coming in contact with any portion of it, and that a passenger coming in contact with the car was injured by electricity, is sufficient, in an action brought by said injured person, to establish negligence *prima facie* if not conclusively.

An expert witness for the street railway company, defendant, having given testimony tending to show that electricity could not be transmitted to a trail-car in sufficient quantities to injure a person, *held*, competent on cross-examination to ask him if there were not, upon certain metal rail-ings of all the defendant's cars, blisters caused by the escape of electricity from trail-cars.

Testimony that no other persons getting on or off the same car at about the same time were injured by electricity, *held*, properly rejected.

APPEAL by defendant from judgment of District Court, Arapahoe county.

The following statement of facts is abridged from that made by the court :

The plaintiff was alighting from a "trailer" attached to a trolley car, when he received the injury complained of.

He alleged in the complaint that "the said train of the defendant was so negligently and carelessly operated and handled by the said defendant, and the said electricity by which said train was operated was so carelessly, negligently and unskilfully used, that an unexpected and sudden jerk or motion was communicated to the said train, whereby the plaintiff was violently and with great force

thrown down upon the track upon which said cars were running, and between the cars of said train, and through the negligent conduct of the said defendant, and by reason of the negligent, careless and unskilful manner in which said train and said electricity was used and operated, the plaintiff received on, upon, and into his body large quantities of said electricity, and that by means of said electricity, his whole system was greatly burned, shocked and injured, so that by means of the fall occasioned by the sudden motion of said train as aforesaid, and by means of the powerful shock received from the electricity aforesaid, and the burns aforesaid, the plaintiff was greatly and severely hurt," &c.

The issues so made were tried by a jury, to which, among many others, the following instructions were given, contended by appellant to have been erroneous :

"1. The court instructs the jury that the defendant company is a carrier of passengers, operating its cars by means of electricity, and is bound to use extraordinary care, and is liable for slight negligence. And, on the other hand, the plaintiff, as a passenger on such car of the defendant, was bound to use ordinary care to guard against accident or injury. And by such ordinary care is meant that care which a person of common prudence takes of his own concern, or that degree of care which men of common prudence exercise about their own matters and their own personal safety. And in determining what would be ordinary care in a particular case, reference must be had to all the circumstances and surroundings of that case. And if, all the circumstances and surroundings considered, the plaintiff in this case used such ordinary care in preparing to get off the defendant's car, and in alighting therefrom, then he is not guilty of contributory negligence in producing the injury complained of, and for which this suit is brought. And getting up from his seat and preparing to get off of the car before the car had fully come to a standstill, but was very slightly moving, was not contributory negligence on the part of the plaintiff, unless such getting up from

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his seat and otherwise preparing to get off the car and alighting therefrom was done in a careless or negligent manner, all the circumstances and surroundings considered. For, if such negligence — if there was any — on the part of the plaintiff was slight, or the remote cause of the injury, he may recover, notwithstanding such slight negligence or remote cause. And, although the plaintiff may have been guilty of misconduct or failure to exercise ordinary care and prudence which may have contributed remotely to his injury, yet, if the agents of the defendant company were guilty of mismanagement or negligence in the management of said car, which was the immediate cause of the injury to the plaintiff, and, with the exercise of extraordinary care by such agents said injury might have been prevented, the defendant is liable in this suit.

“And the jury are further instructed that, in arriving at a conclusion as to whether the plaintiff was guilty of contributory negligence at the time of the happening of the accident, they may take into consideration the natural instinct of self-preservation that any person under ordinary conditions will take care of himself from regard for his own life.

“And, further, the jury are instructed that, if the injury complained of was done to the plaintiff by the electricity used by the defendant for motive power or in any other wise, or by any other means, or on account of the failure of the defendant to use extraordinary care about the operation of its said road and cars, then the defendant company is liable in this suit, unless the plaintiff had failed to use ordinary care and prudence in preparing to leave said car and alighting therefrom, and, even if he failed to use such ordinary care and prudence, defendant company is still liable if this failure to use ordinary care and prudence on the part of the plaintiff was the remote, and the negligence of the defendant company was the immediate cause of said injury.

“2. The presumption is that the plaintiff used ordinary care and prudence at the time of the alleged injury, and it is in-

cumbent upon the defendant to prove that the plaintiff did not use such ordinary care and prudence, and to prove that the want of such ordinary care and prudence on the part of the plaintiff was the immediate, and not the remote, cause of the injury complained of."

James H. Brown and Milton Smith, for appellant.

Markham & Carr, for appellee.

REED, J., delivered the opinion of the court:

* * * * *

One important branch or factor in the case seems to be ignored or overlooked, or at least not treated in argument with the consideration its importance required, viz., the serious injury from electricity, caused by coming in contact with the lower part of the car after falling. The negligence in operating the cars whereby the plaintiff was thrown in such position as to come in contact with the electrical charge, may, undoubtedly, be regarded as the proximate cause of the injuries. The negligent application and use of the electric current, by which the metallic portions of the trail car became charged, was the cause of the damage to the person by shock and burning. The first, proximate and direct, the other resulting; both united caused the damage to the person, consequently, both must be regarded. The car was a "trail," supposed to be entirely free from the influence of the motive power which was applied to the motor car. It was alleged in the complaint "that, by reason of the negligent, careless, and unskilful manner in which said train and said electricity was used and operated, the plaintiff received on, upon, and into his body, large quantities of said electricity, and that, by means of said electricity, his whole system was greatly burned, shocked and injured, so that by means of the fall occasioned by the sudden motion of said train, * * * and by means of the powerful shock received from the electricity," etc.

The fact being established that injuries were caused by

electricity, and that the car was so charged with the fluid as to injure a person by contact with any part of it, if not establishing negligence *per se*, makes such a *prima facie* case as to require defense either to show that the injuries were not caused by that agency, or through the careless use of the agent. No effort was made upon the trial to show that the injuries were not caused by electricity, as stated in the complaint, and established by the evidence; nor was the presence of the fluid explained or attempted. It is true, Mr. Ballow, an electrical engineer in the employment of the company, was called and testified, the result of his evidence being that he knew nothing whatever about it, nor even what car it was; that it was his duty to cause every car to be examined at the station; that he had given such orders, and presumed the examination had been made in the station the night after the accident happened, etc.; all of which was not of the least importance, the question being what the electrical condition was at the time of the injury; that certainly could not be determined by the examination, hours afterwards, of the car detached from the motor, and "housed." Mr. Ballow and a Mr. Dashiell testified, as expert electricians, that the cars were so coupled, constructed, and insulated, that it, in their opinion, would be impossible for the trail car to become so charged with electricity as to cause injury to a person coming in contact with any part of it. However expert, scientific, and learned they may have been upon the subject, and however honest, what they or either of them thought in regard to it was of very little importance when confronted with the facts and results established and uncontradicted.

In *Flannery v. Waterford, etc., Ry. Co.*, 11 Irish Rep., C. L. 30, it was said: "When a plaintiff sustained injuries in consequence of a portion of the train in which she was traveling having left the rails, and the railway, the engine, and the carriages were under the management of the company: *Held*, that the fact of the accident was sufficient evidence to cast upon the company the burden of showing that there was no negligence on their part; and that, as they

declined to afford any explanation of the cause of the accident, there was a case for the plaintiff proper to be submitted to the jury."

* * * * *

Mr. Ballow, an electrical engineer employed by the company, attempted by his evidence in chief to establish the fact that electricity could not be transmitted to a trail car in quantity sufficient to cause injury. On cross-examination he was asked: "I will ask you as a matter of fact, if all the cars running on the Lawrence street line, belonging to the Denver Tramway Company, haven't blisters upon the metal railing around the ends of the cars, caused by a leakage of electricity? Are there not blisters on these the size of my thumb nail, on the metal, caused by this escape of electricity on the rear car?"

The questions were objected to as irrelevant and immaterial, because not limited to the particular car, and about the time of the accident. Counsel seems to have overlooked the fact that witness knew nothing about the accident until the next day, and did not know the car upon which it happened, but had, upon direct examination, testified generally that in the cars as constructed and operated no appreciable amount of electricity could be transmitted to the "trail" car. Such being the fact, the questions asked appear to have been in the line of legitimate cross-examination.

An instructive case upon evidence in this class of cases is *Simpson v. London General Omnibus Co.*, 8 L. R. C. P. 390.

"A passenger in an omnibus was injured by a blow from the hoof of one of the horses, which had kicked through the front panel of the vehicle. There was no evidence on the part of the passenger that the horse was a kicker, but it was proved that the panel bore marks of other kicks, and that no precaution had been taken, by the use of kicking strap or otherwise, against the possible consequence of a horse striking out. and no explanation was offered on the

part of the owner of the omnibus: *Held*, that there was evidence of negligence proper to be submitted to a jury." If evidence of other hoof marks upon the panel was admissible upon direct examination, and sufficient to convict the horse of being a "kicker," it seems that the questions, on cross-examination, under the facts and circumstances of this case, were eminently proper.

Defendant offered to prove by Holland, a passenger, that no other passengers getting on or off the car at about the same time were injured by electricity. Refusal of the court to admit the evidence is assigned for error, and urged in argument. The refusal was proper; the fact sought to be proved could have no bearing upon the questions at issue. In order to be admissible under any circumstances, it would have to have been shown that some other person was in exactly the same position in regard to the car and earth as the plaintiff immediately before or at the exact time of the injury. Probably no other person was so situated as to receive the charge by personal contact or otherwise. One person, by contact, might receive the entire charge from a dynamo or battery, while twenty others in the same room experienced no sensation whatever. If a person were known to be killed by lightning, bore unmistakable marks of the current, it would hardly be competent to attempt to rebut the fact by proof that no other person, or all persons, in the same vicinity, were not killed.

* * * * *

In argument the 1st and 2nd instructions are considered together. It is objected, 1st, "that they are general, instead of being specific. They do not advise the jury what facts, if found by the jury to be shown by the evidence, will constitute in the case negligence, proximate and remote cause, and contributory negligence, which are referred to therein. In short, they refer to the jury both matters of law as well as matters of fact." Again: "They stated mere abstract propositions of law. They were not put hypothetically, as they should have been."

We do not think them amenable to such criticism.

Instead of being general and abstract propositions of law unapplied, they seem to be a full and complete statement of the law of negligence as applicable to the case, and specifically applied in every paragraph to the issues and the facts to be found by the jury. How they could have been more definitely or specifically applied is not shown, nor can we discover. Specific objection is made to the following language of the 1st instruction: "The court instructs the jury that the defendant company is a carrier of passengers operating its cars by means of electricity, *and is bound to use extraordinary care*, and is liable for slight negligence." It is contended that it is not the law. The authorities cited in support of the contention do not sustain it. The most that can be deduced from them is that the rule does not apply where the injury may have been caused by the act of a stranger, nor where the injury resulted from some voluntary act of the passenger himself, combined with some alleged deficiency in the carrier's means of transportation or accommodation. The first, "the act of a stranger," was certainly not involved; and whether the acts of the plaintiff, concurring with the negligence of the plaintiff, combined to cause the injury, was the very question the jury was called upon to determine, and what negligence on the part of the plaintiff would relieve the defendant from the rigor of the rule was clearly and definitely stated.

Applying the rule as intended and applied by the court to cars operated by electricity, and the management and use of the motive power, by which it was shown the injury was produced, it is eminently correct. The agent employed, common experience has taught, is one dangerous to life, even when the utmost skill and prudence of best trained electricians are exercised. It is a subtle, imponderable, death-dealing element or fluid; of its nature, or the laws governing it, very little is known, even among those few most advanced in the study of it. It may be harnessed, utilized as a motive power, and made to perform much economic service in mechanics; but as to its nature and

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vagaries nothing is known. It is full of surprises, and deals injury and death under what is deemed the most prudent management, and under what are supposed to be the circumstances least liable to inflict injury. In the use of such an agent extraordinary care in its management is required. Every appliance and precaution, as well as the best skill of men, should be applied in its use. How little is known of its eccentricities and possibilities, by even those most skilled and familiar with it, was shown upon the trial of this case, where the rear car was charged with it, and the plaintiff received the charge, and his wounds were the undisputed and indisputable evidence of the agency by which they were caused; instead of explaining or showing the conditions to have resulted through no negligence of those in charge, two experts were put upon the stand, who testified to the impossibility of the rear car being charged. Aside from the deadly agent used as motive power, the charge of the court that the defendant was bound to use extraordinary care, and would be liable for slight negligence, is warranted by the authorities. "The law requires a degree of care proportionate to the nature and risks in the given case." *Johnson v. Hud. R., etc.*, 20 N. Y. 65.

"Passenger carriers bind themselves to carry safely those whom they take into their coaches, *to the utmost care and diligence of very cautious persons.*" *Maverick v. Eighth Av. etc.*, 36 N. Y. 378.

"A carrier of passengers by railway is required to show that an injury to a passenger resulted from inevitable accident, or from something against which no human prudence or foresight could provide. *Sullivan v. Railroad Co.*, 30 Pa. St. 234; *Meier v. Railroad Co.*, 64 Pa. St. 225; *R. R. Co. v. Napheys*, 90 Pa. St. 135; *Warren v. Fitchburg R. R. Co.*, 8 Allen, 233; *Phila. v. Derby*, 14 How. (U. S.) 486; *New World v. King*, 16 How. (U. S.) 469; See *Scott v. London Dock Co.*, 3 Hurl. & Colt. (Eng. Exc.) 596.

In *Smith v. St. Paul R. Co.*, 32 Minn. 1, it is said: "The severe rule which enjoins upon the carrier such extraordinary

care and diligence is intended, for reasons of public policy, to secure the safe carriage of passengers in so far as human skill and foresight can effect such result. From the application of the strict rule to carriers, it naturally follows that, where an injury occurs to a passenger through a defect in the construction or working or management of the vehicle, or anything pertaining to the service, which the carrier ought to control, a presumption of negligence arises." In 50 Am. Rep. 550, the case is supported by several pages of notes and almost numberless authorities.

* * * * *

Owing to the importance of the case, the questions involved, and the great industry and ability with which it has been presented, we have examined carefully each point urged, and the authorities cited in support, and we find no serious error. In fact, it appears that the defense was allowed unusual latitude, and if any criticism of the instructions were to be indulged in, it would be that those given for the defendant were fully as favorable as warranted, and, when in conflict with those given for the plaintiff, were more so. It follows that the judgment must be affirmed.

Affirmed.

NOTE.— In this and the preceding case the injury complained of is one of a kind to which passengers upon electric street railways are subject, though happily they do not seem to be of frequent occurrence, to wit, a danger of receiving electric shock while traveling upon cars.

In the last case the company was held to a very high degree of diligence, as it undoubtedly should be, to impel such companies to every possible exertion to guard against accidents of this kind. The interests of the companies would, however, naturally operate very effectually in the same direction.

See note to *Clements v. Louisiana Elec. Light Co.*, post.

**SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY V.
J. B. ROBINSON.**

United States Circuit Court of Appeals, Fifth Circuit, May 30, 1893.

(50 Fed. Rep. 810.)

INJURY BY SHOCK FROM TELEPHONE WIRE.—PROXIMATE CAUSE.

Plaintiff was injured by contact, during a thunder storm, with a telephone wire, which had been permitted for several weeks to remain suspended over a highway within a few feet of the ground.

Held, that the wire was the proximate cause of the injury, since without it the electricity would have been harmless.

ERROR to the Circuit Court for the northern district of Texas. Appeal by defendant below.

Statement of case by BRUCE, District Judge.

Plaintiff in error was sued by defendant in error in the District Court of Cooke county, Texas, for damages in the sum of \$12,000. He states his cause of action as follows:

Your petitioner, J. B. Robinson, a resident of Cooke county, Texas, complaining of the Southwestern Telegraph & Telephone Company, a private corporation incorporated under the laws of the State of New York, but doing business in the State of Texas, and having a legal office at Gainesville, Cooke county, Texas, respectfully represents that on or about the 29th day of October, A. D. 1889, the defendant owned and operated a telephone line between the cities of Gainesville and Dallas, Texas, and intermediate points, the connection between said cities being made by a single wire suspended by means of poles in the manner of telegraph wires, usually about thirty feet from the ground; that its said telephone line of wire crossed the public highway between Dallas and McKinney, known as the "Dallas and McKinney Road," about five miles south of Plano, in Dallas county; that at said points and over said

road on the aforesaid date, and for several weeks prior thereto, the defendant negligently suffered and permitted its aforesaid wires to be and remain suspended over said road within a few feet of the ground, and within such proximity thereto that travelers on the said road unavoidably and necessarily came in contact therewith; that the said wire so suspended over said road, which was a public highway between two large cities, and daily traveled by many people in vehicles and on horseback, all of which was known to the defendant, was a dangerous and unlawful obstruction of said road, and a public nuisance, and that the defendant on the aforesaid date, and long prior thereto, knew of the condition of said wire at said point, or might have known by the exercise of reasonable care, but nevertheless negligently permitted it to remain in the condition aforesaid; that the said wires are the best known conductors of electricity, and are the only vehicles in general use for the transmission of electric currents, and, during electric or thunder storms, such wires ordinarily become heavily charged with electricity, of power sufficient to inflict death or do great injury to those coming in contact with them, and that from this fact arises the peculiar danger of allowing such wires to remain suspended so low that people will come in contact with them, all of which was on the aforesaid date and long prior thereto well known to the defendant, or might have been known to it by the exercise of ordinary care; that on the afternoon of the aforesaid date, as plaintiff was traveling on horseback on the said Dallas and McKinney highway during the prevalence of a heavy thunder storm, such, however, as is usual in that section at that season of the year, he came in contact with the defendant's said wire at the point aforesaid, in consequence of its being suspended so near the ground; that it was a dark, stormy evening, and the wire was invisible to plaintiff, and plaintiff came in contact with it through no fault or negligence on his part, but through the gross negligence and carelessness of the defendant, as aforesaid, in leaving the wire suspended over a public highway within a few feet of the ground; that at the

time said wire was heavily charged with electricity generated by the storm then prevailing, as aforesaid, and, on coming in contact with it, plaintiff received a full charge of the fluid, which knocked him from his horse and completely paralyzed him for the time being, depriving him of the power of speech and locomotion; that plaintiff lay in the road where he had been thrown, in the rain and storm, until picked up by a passer-by, and carried to a neighboring house, and there plaintiff was confined to his bed for more than five weeks, suffering during this period severe bodily pain and mental anguish. Plaintiff represents that he is but little past middle age, and before said injuries was of a vigorous mind and robust constitution, and capable of great endurance and physical and mental activity, but that, in consequence of said injuries, his health and mental faculties have been permanently and seriously impaired, and his capacity to pursue his usual avocation practically destroyed, to his actual damages ten thousand dollars. Plaintiff further represents that, on account of said injuries, he has been put to great expense for medical attention, and that his condition is such as to require, for the future, constant medical treatment and the care of his family, who are thus withdrawn from their customary duties, to his actual damages two thousand dollars. Wherefore, plaintiff sues, and prays that the defendant be cited to answer herein, and that on final hearing he have judgment for his said damages, costs, and for further general and special relief.

The case was removed into the Circuit Court of the United States for the northern district of Texas, and the defendant answered as follows:

Now comes defendant, and for answer by way of demurrer to plaintiff's cause of action says, first, that plaintiff ought not to have and maintain this cause, for that his original petition does not state facts sufficient to constitute a cognizable and enforceable demand before the law. Of this he prays the judgment of the court. And for further answer, if such be necessary, defendant says it denies each and singular the allegations in the plaintiff's petition contained, and

says it is not guilty of the wrongs, injuries, and negligent conduct charged; and for this it puts itself upon the country. And, answering further, it says if plaintiff was injured in any manner, it was the result of his negligence, — that he failed to exercise that reasonable degree of care, in traveling at the dangerous time in which he alleges he was traveling, and in avoiding contact with defendant's line during a thunder storm, that a reasonably prudent man ought to have exercised under like circumstances. Wherefore, defendant says plaintiff ought not to recover, and of this puts itself upon the country.

The case was heard, and the demurrer was overruled, to which ruling the defendant excepted, and the trial before court and jury resulted in a verdict for the plaintiff in the sum of \$2,500, for which amount, with interest and costs, judgment was afterwards rendered. Motion for a new trial was filed, heard, and overruled by the court. The assignment of error is that in the record of the proceedings of the above cause in the trial court there is a manifest error, in this, to wit:

“The court erred in overruling the general demurrer of the said Southwestern Telegraph and Telephone Company to the original petition and cause of action of the said J. B. Robinson, as will appear from inspection of the said petition, demurrer, and judgment of the court thereon.”

John W. Wray, for plaintiff in error.

M. L. Crawford, *W. O. Davis* and *J. L. Harris*, for defendant in error.

BRUCE, District Judge: The question and the only question for review here is whether the plaintiff stated a cause of action in his petition, and if the demurrer to the cause of action, as stated by the plaintiff in the court below, was properly overruled. In *Railroad Co. v. Jones*, 95 U. S. 439, it is said negligence is the failure to do what a reasonable and prudent person would ordinarily have done, under

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the circumstances of the situation, or doing what such a person, under the existing circumstances, would not have done. It would seem too plain to require argument that the allegations of the petition show negligence on the part of the telephone company. Under the facts and circumstances stated, the wire was an obstruction upon the public highway. Travelers were liable to collide with it, and injurious consequences to them would follow as the natural and probable result of such contact. Article 622 of the Revised Civil Statutes of Texas provides :

Corporations created for the purpose of constructing and maintaining magnetic telegraph lines are authorized to set their poles, piers, abutments, wires and other fixtures along, upon and across any of the public roads, streets, and waters of the State, in such manner as not to incommode the public in the use of such roads, streets or waters.

The duty on the part of the telephone company was clear to prevent its wire from becoming an obstruction on the highway. Under the circumstances shown the defendant in error might have been hurt by coming in contact with the wire of the telephone company, and injuries to the defendant in error might have resulted, independent of the fact that the wire at the time was loaded with a charge of electric fluid from the clouds and storm then prevailing. So that it is difficult to see how this verdict could be disturbed even if the contention of the plaintiff in error is correct, that the electricity with which the wire was charged at the time was the proximate and immediate cause of injury to the defendant in error, for which the telephone company cannot be held responsible. Negligence is a mixed question of law and fact, and is a question for the jury, under proper instructions from the court. It is not claimed here that the court misdirected the jury in its charge on the law of the case, and the verdict is: "We, the jury, find for the plaintiff in the sum of twenty-five hundred dollars." The jury found negligence on the part of the telephone company, resulting in injuries to the defendant in error, and for which they assess his damages at \$2,500.

It is not shown that the jury found that the wire of the telephone company was charged with electricity at the time the defendant in error came in contact with it, and that the electric fluid was the cause of the injury to the defendant in error, and so it is not clear that there was any error in the ruling of the court, even upon the theory of the case insisted upon by the plaintiff in error. No point is made on the question of contributory negligence, and the contention of the plaintiff in error seems to be that the petition states the cause of action to have been the injuries which resulted from the fact that the wire at the time of the contact with it by the defendant was charged with electric fluid, for the creation and existence of which the telephone company was in no sense responsible. Persons, however, must be held to know the ordinary operation of the forces of nature, and to use proper means to avert danger. If the electric fluid with which the wire of the telephone company was charged at the time was an element or the main element in the production of the injuries to the defendant in error, still it is clear that the displaced wire furnished the means of the communication of the dangerous force which resulted in the injuries to the defendant in error. Science and common experience show that wires suspended in the atmosphere attract electricity in the time of storms, and when so suspended and uninsulated are dangerous to persons who may at such times be brought in contact with them, and the petition charges that, during electric or thunder storms, such wires ordinarily become heavily charged with electricity, of power sufficient to cause death or great injury to those coming in contact with them; and whether this is so or not is a question of fact. To say that the agency of the telephone wire in the production of the injury was inferior to that of the electric current, which was the main cause, is not satisfactory. It is, in fact, proper to admit that the company's displaced wire furnished the means by which the dangerous force was communicated to and injured the defendant in error. True, it was a new force or power which intervened, with the production of which the

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telephone company had nothing to do, but upon this point in *Insurance Co. v. Tweed*, 7 Wall. 52, the court say :

“If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote.”

The new force or power here would have been harmless but for the displaced wire and the fact that the wire took on a new force, with the creation of which the company was not responsible, yet it contributed no less directly to the injury on that account. In *Gleeson v. Railroad Co.*, 140 U. S. 435 (11 Sup. Ct. Rep. 859), the court held that a landslide in a railway cut caused by an ordinary fall of rain is not an act of God, which will exempt the railway company from liability to passengers for injuries caused thereby while being carried on the railway ; and on page 441 (page 861, 11 Sup. Ct. Rep.), of the opinion in that case the court, quoting from an English case, say “that the plaintiff was entitled to a verdict on the ground that, if a person maintains a lamp projecting over a highway for his own purposes, it is his duty to maintain it so as not to be dangerous to persons passing by ; and if it causes injuries, owing to a want of repair, it is no answer on his part that he had employed a competent man to repair it ;” citing 1 Thomp. Neg., pp. 346, 347. No case is cited like the one at bar, but the principles upon which cases of this character have been decided sustain the verdict in this case, and the judgment of the court is affirmed.

NOTE.—This case is cited in the following one, also in *Ahern v. Oregon Teleph. Co.*, *post*.

See note to *Clements v. La. Elec. Lt. Co.*, *post*.

AHERN V. OREGON TELEPHONE CO.*Oregon Supreme Court, June 19, 1893.*

(24 Or. 276.)

INJURY BY ELECTRIC SHOCK.—PROXIMATE CAUSE.—PLEADING.

A telephone company having by permission of an electric light company strung a wire upon the poles of the latter, it was its continuing duty to protect the public from injury by such wire.

Therefore, where, having ceased to use the wire, instead of removing it, the telephone company hung it upon an electric light pole, the owner of which removed it to a telephone pole, where it became charged from an electric light wire, and hanging near the ground caused injury to a traveler, held, that the proximate cause of the injury was the negligence of the telephone company.

In an action for damages for injuries caused by such negligence the proof held not to constitute fatal variance from the pleading.

Case of this series cited in opinion: *Southern, &c. Teleph. Co. v. Robinson*, ante, p. 842.

APPEAL by defendant from judgment of the Circuit Court, Multnomah county. Facts stated in opinion.

Chas. H. Carey (*R. & E. B. Williams* on the brief), for appellant.

James Gleason, and *Alfred F. Sears* (*Henry E. McGinn* and *Nathan D. Simoa* on the brief), for respondent.

The Chief Justice LORD delivered the opinion of the court: This is an action to recover damages for a personal injury alleged to have been caused by the negligence of the defendant in permitting its wire to come in contact with an electric wire, whereby it became heavily charged with electricity, and in allowing such wire to hang down so near the ground at the corner of K and Twenty-first streets as to endanger the life and limb of those traveling upon such

streets. The errors assigned relate to the refusal of the trial court to grant a nonsuit, and to certain instructions given and refused. Upon the first point the contention is that the evidence does not prove the cause of action alleged, although it may be sufficient to constitute a ground of action, and consequently that the variance is fatal to the plaintiff's recovery. It is no doubt true that the plaintiff must state the facts which constitute his cause of action, and that he cannot state one and prove another. The Code, with all its comprehensive liberality, will not admit, as SHERWOOD, J., said, "a plaintiff to sue for a horse and recover a cow." *Waldhier v. Hamilton Railroad*, 71 Mo. 518. Such variance is fatal, for the reason that the cause of action is unproved in its entire scope. The inquiry, then, is whether the testimony for the plaintiff establishes a cause of action different from the one alleged. That there is some variation between the evidence and the complaint, may be conceded, but it consists only in matter of detail, or as to how the injury occurred; there is no absolute departure in the proof from the original theory of the case. The point to which the variance relates is this: The allegation, in substance, is that the plaintiff was walking along the sidewalk, and came in contact with the wire, which, owing to the darkness, he was unable to see; that he attempted to remove the same from his pathway, and in doing so he caught hold of the wire, and the electricity with which it was impregnated passed into his body, etc.; whereas his testimony shows that he was walking along the sidewalk, and owing to the darkness and rain and the slippery pavement, he slipped and fell on his elbow, causing his hat to fall off and some packages to drop out of his hands, and that in groping for his hat and packages, his hand came in contact with the wire, which, being impregnated with electricity, "grabbed" it, and, as he could not let go, he put out his other hand to remove the same, when the wire "grabbed" that hand, etc. Plainly the variation here is only of detail, or as to the circumstances under which the plaintiff came in contact with the

wire, and received the injury. The elements of negligence alleged, namely, in permitting its wire to come in contact with the electric wire, and to hang so near the ground as to endanger life or limb, are present in either aspect of the case, or as much under the testimony as the allegation. Such variance does not present a case where the cause of action is unproved in its entire scope and meaning, within the construction of section 98, Hill's Code. Hence there is not a failure of proof, and without such failure the variance is not fatal, or such as would entitle the defendant to a judgment of nonsuit.

The principal ground of complaint remains, however, to be considered. This is, was the negligence of the defendant the proximate cause of the injury? There are some other minor questions suggested by way of criticism upon the charge of the court, but the remoteness of defendant's acts, and the intervention of other agencies directly contributing to plaintiff's injury, are relied upon as the chief defense. It was the failure of the court, as indicated by the instructions given and refused, to properly apply the law in this regard, that constitutes the main grievance of the defendant. To comprehend the force of this objection, we must first know and understand the facts.

The plaintiff is a laboring man, and was employed by the gas company to shovel coal into its furnace. On the day of the accident he quit work after five o'clock P. M., and started for his home, but on his way went to market, made some purchases, and went out G street to Twenty-first, and when passing down that street, near the corner of K, he slipped on the sidewalk, and fell on his elbow, his hat falling off, and the packages which he carried flying out of his hands. After he got up he groped for his packages and hat, when his hand rubbed against a wire, one end of which was hanging down over the sidewalk at the intersection of the street. His testimony on this point is: "My hand rubbed against this wire, grasping hold of me fearfully; I then took the notion to put up this hand to hit this one away from there; it grabbed that one and held on to it

fearfully ; I could not let go ; it was too strong ; I don't know what part of my hand caught hold of it ; my fingers rubbed it first ; it tore me fearfully, like machinery with about two hundred pounds of steam ; I was screaming awfully, and finally I saw people around the sidewalk, and this hand after awhile dropped from the wire ; that must have been the time my toes got burned. It whirled me up in all sorts of shapes. I don't know how I was. When this hand dropped I hung on with it until I was released. After this hand dropped I had no more memory at all ; I lost my senses. I don't know what happened after that." Several persons hearing his screams for help, two men ran from J street to his assistance, and one of them slashed at the wire with his knife and received a severe shock, but did not sever it ; after some hesitation he slashed it again and succeeded in cutting the wire. The defendant was assisted to his home and put to bed, when it was found that three toes were badly burned. Afterwards he was taken to the hospital and one toe was amputated and the others were trimmed off. It was after six o'clock and quite dark when the accident occurred, and the sidewalk was slippery from recent rain. The defendant could not see the wire, nor did he know that it was hanging down over the street, nor that it was charged with electricity. The wires of the telephone company were strung on K street, running east and west, and the wires of the electric light company and the electric street railway company were strung along Twenty-first street, running north and south, so that the wires of the defendant were at right angles to the wires of the two electric companies. The evidence further shows that the defendant had an arrangement with the electric light company by which either might use the poles of the other upon which to string a wire when it had no poles at that place, and only a short distance of wire was to be used ; that the defendant used the poles of the electric light company when wiring the residence of a Mr. Bates at the corner of H and Twenty-first streets, but that some three months before the accident the wire was

disconnected from the telephone at his residence and wrapped around the electric pole and made fast by tying it on to a bracket, and winding around the pole and around itself; that such wire had not been used by defendant after it was so disconnected, nor had the company made any inspection of it from that time until the accident; that during this interim the electric company changed its poles and wires along Twenty-first street, and in doing so took down the pole belonging to it upon which the telephone wire was fastened as aforesaid, coiled up the wire, and hung it on a pole belonging to the defendant near K and Twenty-first streets, where the accident happened; but that the defendant had no knowledge that the electric company had taken down its poles or taken down its wire and hung it on the pole as aforesaid. Richard Gerdes testified that he was in the employ of the electric light company, and that on the night of the accident he received a message by telephone that a man had been hurt by an electric light wire; that he went at once to the place where the accident occurred, and found the wire hanging on the pole; that he cut it above the coil; that it was heavily charged with electricity by contact with a wire belonging either to the electric street railway or the electric light company; that it must have been the wire of one or the other that charged it with electricity, as there was no other heavily charged wire in that vicinity. The evidence further shows that the day before the accident the wire was hanging in the form of a coil on a stick at the side of the telephone pole, and that the bottom of it was two or three feet from the ground; that it was heavily charged with electricity, and that one witness who touched it with a wire was thrown to the ground from the shock.

Among other things, the court, in substance, instructed the jury that the question here submitted is "whether it was negligence or not to leave a wire along a public thoroughfare, where it might be found in the way of pedestrians, or where it might be liable to be handled or

interfered with by boys or by irresponsible persons." That it was for them to determine from the evidence "whether or not there was a proper inspection made of these wires so as to know what their condition was, and to ascertain whether anybody had been interfering with them, making them more dangerous than they otherwise would be." That "the fact that this company used the poles of another company, and the fact that other electric companies had wires upon the same street, does not detract at all from the strict requirements which should be made of the defendant company. Unless it had loaned its wires to the electrical company, or the electric railway company, and placed them under the control of that company, it could not be absolved from the duty of looking after them and ascertaining and knowing what their condition was, and of anticipating and foreseeing what might happen in connection with them, and that unless you should find from the evidence that this defendant had turned over the use and control of its wires to these other companies on whose pole this wire was suspended, you have no right to say that those companies were liable, and not this company, if this company was guilty of any negligence. Unless this company was negligent, there could be no recovery on the part of the plaintiff. If you find that it was not guilty of any negligence, then your verdict should be for the defendant." The counsel for the defendant requested the court to instruct the jury as follows: "If the jury finds that the defendant was not negligent in leaving its wire attached to the pole near Mr. Bates' house, as it did leave it, and that the wire was not dangerous as left by it, and could not, and did not, become dangerous except by the act or neglect of some other person or company, the defendant is not liable;" but the court refused to charge as requested, but gave it with the following modification: "I give you that in connection with the general instruction which I gave you that the defendant must have parted with the control of its wires in order to be exonerated by the reason of the negligent act of some other person." The defendant also

requested the court to charge that, "it is claimed by the defendant that it placed its wires in a safe and secure position, and that it [they] did not become dangerous except by the acts and omissions of others, without its knowledge or consent. If you find this is true, the defendant is not liable, unless the intervening acts or omissions of such other persons should have been contemplated and guarded against by the defendant as consequences likely to follow and which might have been reasonably anticipated." And again: "If it was not negligent in leaving the wire as it did, it is not liable, unless it could have reasonably foreseen that some one would take down the wire, and place it where it injured the plaintiff, and that it might come in contact with some other electric wire that was charged with a current of electricity that would make it dangerous." And, again: "Even if the defendant had left its wire coiled up or hanging over the sidewalk so that pedestrians might come in contact with it, it would not be liable for damages to the plaintiff for injury sustained by an electric shock from the wire unless the fact that the wire left there was the immediate or proximate cause of the injury, the wire not by itself being dangerously charged with electricity, and became so charged only by intermediate circumstances, namely, that of interfering with or crossing some heavily charged wire," etc. The court refused to so instruct the jury, and to its rulings thereon the defendant duly excepted.

It appears from the instructions that the theory of the law as applied to the facts by the trial court was that it is negligence to allow a wire, which, from its environment, is liable to become charged with electricity, to hang over the street at such a height as to obstruct and endanger ordinary travel; that it was the duty of the defendant, owing to the location of its wire and the use of the poles of the electric light company, to look after it and see that it was in proper condition, and that when the wire was disconnected from the Bates residence, if, instead of taking down the wire, the company chose to hang it upon the electric

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pole, the duty still devolved upon it to take care of such wire, and that this was a continuing duty from which it would not be absolved unless it had parted from the control of its wire to the electric companies. This requirement imposed upon the defendant the obligation of looking after and ascertaining the condition of its wire, and of anticipating or foreseeing results which were likely to happen by reason of its connection or location as to the electric wires so as to avoid liability to danger arising therefrom. In this view of the law, the taking up of the pole by the electric light company, and hanging the defendant's wire upon its pole at the intersection of K and Twenty-first streets would not authorize the jury to find that the electric companies were liable, and not the defendant, if it was negligent in not removing its wire when it ceased to use it at the Bates residence. It is earnestly insisted by counsel that this view of the law is a wrong conception of the defendant's duty, for the reason that it makes the company liable for the wrongful acts of third persons in taking down the wire and hanging it on the pole where it became charged with electricity, which, he claims, are the responsible causes of the injury. This is based on the assumption that there intervened between the negligence of the defendant, if any there was, and the injury to the plaintiff, an independent adequate cause of the injury, namely, the wrongful act of the electric company, which was the proximate cause of the injury. What is the proximate cause of the injury is ordinarily a question for the jury. It is only when the facts are undisputed that it becomes a question for the court. Wherever, therefore, there is any doubt, the question of proximate cause should be submitted to a jury to be decided as a matter of fact according to the circumstances of the case. To warrant a jury in finding that negligence is the proximate cause of the injury it must appear that the injury was a natural and probable consequence of the negligence, and that it ought to have been foreseen in the light of the attending circumstances. *Railway Co. v. Kellogg*, 94 U. S. 475. The question, therefore, whether

the stretching of the defendant's wire on the electric poles instead of its own poles, and whether the omission of the defendant to remove the same when it ceased to use it at the Bates residence, was negligence, and, if it was, whether the intervening act of the electric company and its consequences were such as could have been reasonably anticipated and guarded against by the defendant, was for the jury to determine in the light of the facts and circumstances.

The record discloses that the electric light company gave the defendant permission to use its poles upon which to string its wire when the defendant needed them to connect its wire to a residence where it had no poles. When the defendant disconnected its wire from the telephone at the Bates' residence, it had no longer any need to use the electric poles, and the permission or license given to use them ceased, or was at an end, and necessarily the defendant ought to have removed its wire from the electric poles; and if it did not do so, but coiled and hung it on one of them, where it had no right to be, the defendant was bound to look after it, and to expect, if it failed to do so, that the electric company would remove it when such wire incommoded that company, or its business required the removal of its poles, as did happen. The jury found that the stretching of the wire upon the electric poles was dangerous, and that the omission of the defendant to remove it, when it disconnected the same from the Bates' residence, and ceased to use it, was negligence, and that the intervening acts of the electric company and its consequences could have been foreseen as likely to happen, or possibly to follow, from leaving the wire coiled and hung upon the electric pole near the Bates' residence, and necessarily that the defendant was responsible for its wire being coiled and hung upon its own pole at the intersection of K and Twenty-first streets. This responsibility is based on the principle that if the defendant, instead of removing its wire, chose to hang it upon the electric pole, where it had no right to be, it was bound to look after it, and that, if the defendant had

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done so, it would have discovered the removal of the same, and its condition, so that the injury might have been avoided, and consequently that the company must be taken to have foreseen as likely to happen, or possibly to follow, the consequences which resulted from its omission to remove the wire when it was disconnected from the telephone at the Bates' residence. This is in accordance with the rule that a person guilty of negligence or an omission of duty "should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would have thought at the time of the negligent act reasonably possible to follow if they had been suggested to his mind." Shearman & Redfield, Negligence, § 29.

But this phase of the case is met with the argument that the telephone wire itself is not dangerous, and that the main or efficient cause of the injury was the electric current from the wires of the electric companies, with the production of which the defendant had nothing to do. In other words, that if the defendant was negligent, it was the dangerous force of electricity which intervened, and with the production of which the plaintiff had nothing to do, that communicated the injury to plaintiff, and, therefore, it was the proximate cause of the injury. It is no doubt true that where there is negligence and injury following it, and there is also an intermediate cause disconnected from the negligence, and the operation of this cause produces the injury, the person guilty of the negligence cannot be held responsible for the injury. The inquiry must always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. *Railway Co. v. Kellogg*, 94 U. S. 475. If the intervening cause and its probable consequence be such as could reasonably have been anticipated by the original wrong-doer, the causal connection between the wrongful act and the injury is not broken, and the defendant is liable for the injury. In *Sewing Machine Co. v. Richter*, 2 Ind. Ap.

334 (28 N. E. 446), it is said : " Intervening agencies sometimes interrupt the current of responsible connection between negligent acts and injuries, but as a rule these agencies, in order to accomplish such result, must entirely supersede the original culpable act, and be in themselves responsible for the injury, and must be of such a character that they could not have been foreseen or anticipated by the original wrong-doer. If it required both agencies to produce the result, or if both contributed thereto as concurrent forces, the presence and assistance of one will not exculpate the other, because it would still be an efficient cause of the injury." The intermediate cause must supersede the original wrongful act or omission, and be sufficient of itself to stand as the cause of plaintiff's injury, to relieve the original wrong-doer from liability. " One of the most valuable of the criteria furnished us by the authorities," Mr. Justice MILLER said, " is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient as the cause of the misfortune, the other must be considered as too remote." *Insurance Co. v. Tweed*, 7 Wall. 52. There is no claim that the wires of the companies transmitting electric power were not in their proper position, or that the companies were negligent in the use of their wires. We must take it, upon the facts as disclosed by this record, that their wires were where they had a right to be, and were not an obstruction endangering the life or limb of any one traveling along the street. It was the telephone wire, suspended on a pole, as shown by the evidence, that furnished the means by which the currents of electricity passing over the electric companies' wires, were diverted and conducted so close to the ground as to render passage along the public thoroughfare exceedingly dangerous. As a consequence, it was the defendant's wire so hanging upon the pole that furnished the means by which the electrical current was communicated to and injured the plaintiff. It is true that the electrical current was a new power which intervened, and with the

production of which the defendant had nothing to do, but it was harmless, or could not have been communicated to the plaintiff but for the suspended wire of the defendant. As an intermediate cause it was connected with the primary fault and not self-operating, and therefore is not sufficient itself to stand as the cause of plaintiff's injury. The language of Mr. Justice BRUCE clearly illustrates this point: "To say that the agency of the telephone wire in the production of the injury was inferior to that of the electric current, which was the main cause, is not satisfactory. It is, in fact, to admit that the company's displaced wire furnished the means by which the dangerous force was communicated to and injured the defendant in error. True, it was a new force or power which intervened, with the production of which the telephone company had nothing to do, but upon this point, in *Insurance Co. v. Tweed*, 7 Wall. 52, the court says: 'If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote.' The new force or power here would have been harmless but for the displaced wire, and the fact that the wire took on a new force, with the creation of which the company was not responsible, yet it contributed no less directly to the injury on that account." *Southwestern T. & T. Co. v. Robinson*, 50 Fed. Rep. 813 (16 L. R. A. 545). It thus appears that the defendant's negligence was the primary and proximate cause of the injury. In view of this result, the other errors assigned are of little importance, and not such as would authorize the reversal of the case. It results that the judgment must be AFFIRMED.

UPON REHEARING, JANUARY 8, 1894 (35 Pac. R. 549).

LORD, C. J.: The suspended telephone wire, while it was charged with electricity from contact with the electric wire, was not less dangerous than the electric wire itself would have been, similarly suspended as to the street. It was this condition of affairs that led the court, in its charge, to refer to electricity generally as a "subtle and

dangerous agency," which required the "utmost caution to control." As the telephone wire was liable to become charged with such dangerous agent and thus to become dangerous to the traveling public, the duty of inspecting and ascertaining the condition of the wires, and whether there was any interference making them more dangerous than they otherwise would be, was necessarily involved. In view of these circumstances, the degree of care imposed was commensurate with the danger. "Due care is a degree of care corresponding to the danger involved." Cooley Torts. It is not the same in all cases. The term is relative and its application depends on the situation of the parties, and the degree of care and vigilance which the circumstances reasonably impose. Where the danger is great, a high degree of care is necessary, and the failure to observe it is a want of ordinary care under the circumstances. Hence, a wire liable to be charged with an agency so dangerous and difficult to manage, while so located, needed to be looked after with such degree of care and vigilance as would guard the public against liability to accident from it. The court then said: "The question is here submitted to you whether it was negligence or not to leave a wire along a public thoroughfare where it might be found in the way of pedestrians, or where it might be liable to be handled and interfered with by boys or by irresponsible persons." It further added: "Negligence, in cases of this kind, means the doing of some act which a cautious and prudent man would not do, or the neglecting to do some act which a cautious and prudent man would not neglect. Applying those definitions to this case, the inquiry to be solved by you is, what did this defendant do that a cautious and prudent man would not not have done, in connection with the wire which has been described to you in the testimony, and which is mentioned in the pleadings?" These instructions, taken in connection with the instructions referred to in the main opinion, we think fairly present the law governing the case.

NOTE.— See note to *Clements v. La. Elec. Lt. Co.*, *post*.

**KANKAKEE ELECTRIC RAILWAY COMPANY V. HIRAM
WHITTEMORE.**

Illinois Appellate Courts, Dec. 12, 1892.

(45 Ill. App. 484.)

INJURY BY ELECTRIC SHOCK.— NEGLIGENCE.

A dead telephone wire had for about eighteen months hung diagonally over and about two feet above the trolley wire of an electric railway. It was not unusual for a trolley to slip from its wire, and if it did so and was not restrained it would fly up to a perpendicular position extending several feet above the telephone wire.

This having occurred at a certain time, the trolley pole, dragged along by the car, came into contact with the telephone wire, broke it, so that it fell upon and over the trolley wire, and one end fell upon the rail, thus charging the wire and completing the circuit. Plaintiff's horse, driven by an employe, who did not notice the wire, came into contact with it and was killed by the electric current.

Held, that the jury was authorized in finding that the failure of the conductor to restrain the trolley pole from hitting the telephone wire was negligence, for which the railway company was responsible.

The question of negligence of the telephone company or of the city in leaving the telephone wire where it was before the accident was not in issue and evidence thereof was properly rejected.

APPEAL from Circuit Court, Kankakee county.

D. H. Paddock, for appellant.

William Porter, for appellee.

Mr. Justice LACEY: The appellant constructed an electric railway in the streets of Kankakee, under a franchise under the city corporation, granted in July, 1891. The cars were operated by what is known as the trolley wire system, or overhanging wire and trolley pole system. Appellee is a grocer in the city of Kankakee, having his store on the south side of Court street and the east side of

Dearborn avenue, at the corner. Court street runs from east to west, and Dearborn avenue runs from north to south, crossing each other at right angles. Schuyler avenue is the next avenue west of Dearborn, and distant 330 feet. At the point where Court street crosses Dearborn avenue, reaching from the corner on the west side of Dearborn avenue and the south side of Court street, and running diagonally north and across Court street to the east side of Dearborn avenue and north side of Court street, was stretched a telephone wire, about eighteen inches above the trolley wire and diagonally across it, which telephone wire had been there several years, and had been, prior to the time of the accident which is the cause of this action, for a year and a half not in use, but what is called a dead wire.

The declaration charges, in three separate counts, that appellant was propelling cars on its railway along Court street by means of trolley wires and trolley poles, and that appellee was the owner of a mare, and there was running across the said Court street, over the electric wire and close thereto, a certain other wire, which had there remained a long time, etc., and might and could be easily seen by the servant of the defendant engaged in operating the said cars; that appellee's servant was driving his horse in said street with due care on his part, when a car of appellant, by its servant, carelessly and negligently permitted the trolley wire pole connected with said car to come in contact with the wire run off and across the said electric wire, broke the same, knocked it onto the electric wire, and thus against the horse of the appellee, which said wire became charged with electricity, and then and there killed the said horse. The second charges the manner of killing the horse in respect to the manner of contact of the horse with the telephone wire; that the trolley pole, on account of carelessness of appellant's servant driving the car, struck the said wire onto the electric wire of appellant, and then against the horse of appellee, and by means thereof killed the horse. The third count charges that appellant, while running its car, negli-

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gently and carelessly managed the same so that a certain wire, charged with great electric power, was thrown against appellee's horse, which was killed.

There was a plea of not guilty and trial by jury, and verdict for appellee for \$180, upon which judgment was rendered. From such judgment this appeal is taken.

The errors assigned are that the verdict is against the weight of the evidence; that the court excluded proper evidence on part of appellant; and also refused to give proper instructions offered by appellant. The point of attack on the evidence is that it failed to show any negligence on the part of appellant's servant, and that it showed negligence on the part of appellee's servant driving the horse. Therefore we will only notice the evidence so far as it bears on those points. It appears that the trolley pole is operated by a rope or cord and can be lowered or raised by it at the will of the operator or conductor, and it is liable to get off the trolley wire, from which it communicates the electric power to the propelling apparatus or engine of the car, and it will then fly up and stand straight up at the point where this telephone wire crosses the trolley wire, as much as five feet, if not controlled; this would put it two or three feet above the telephone wire, when standing in that position. We think it quite clearly appears from the evidence of Hatch, Halsey, Bonfield and Laford, sworn for appellee, that on the day of the accident this trolley pole got off the trolley wire east of Dearborn street, and a short distance east of the telephone wire, when it crossed the trolley wire and flew up above the telephone, and the car passing along westerly, the force of the trolley pole tore the telephone wire loose from the pole to which it was attached, at the corner near Fries' drug store, on the south side of Court street; that the wire fell down at that end, and being still attached at the other side of the street, on the north, at Orr's store it fell down to the ground at the south end, and resting on the trolley wire in the center of the street, and the broken end on one of the rails of the track, formed a complete circuit of electricity, and the wire

formed a kind of loop in the street. Within a very short time after the car passed by, a boy by the name of Klitz, who was, at the time, driving the horse of appellee attached to his delivery wagon, attempted to cross the street at this point, and not observing this telephone wire, his horse ran over it, and was instantly killed by the electric current passing through the wire. While the manner of the accident is not precisely stated in the declaration, we think that the allegations of the second and third counts are general enough so that there is no variance.

It is true that Huffman, the conductor of the car at the time of the accident, denies that the trolley pole struck the telephone wire, and testified that he was on the back end of the car at the time he passed down the street west along Court street, and had hold of the rope attached to the pole all the way down the street; and he says when the pole gets out of position it pulls a heavy weight on the rope, and you feel a jerk, so he knew the trolley pole was not off. The trolley pole, he says, cut off the wire the first time just east of Schuyler avenue; that would be west of this telephone wire a block off. There is a grade down past Dearborn and Schuyler avenues to the west, where the car will run by its own weight without any propelling power. But we think the jury was fully justified in giving credence to appellee's witnesses and rejecting the evidence of Huffman. If the point then was established according to the contention of the appellee that this pole was allowed to remain off in so dangerous a place as where the telephone wire crossed the trolley wire and allowed to knock that wire loose unobserved, it would appear to have been an act of negligence on the part of the conductor, for which the appellant was responsible. The presence and position of this telephone wire must have been well known to appellant, as it was in plain view, and it must have been known if the trolley pole should be allowed to be loose at that point while the car was being run, that there was a great danger of breaking loose the telephone wire, and its dropping down as it did, and the great consequent danger

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of some one getting against it. Under the circumstances we think the jury was amply justified in finding negligence, as charged in the declaration. The circumstance of the driver of appellant's horse not seeing the wire on the occasion was not remarkable, and we think that the jury was also justified in finding for appellee that his servant was in the exercise of care.

The rejection of the appellant's evidence offered by it to show that the city of Kankakee or the telephone company was negligent in leaving the telephone wire suspended in the manner it was and that appellant had no right to remove it, was not error. Neither was it error in the court below refusing the appellant's instructions on the same point. These were matters entirely foreign to the issue being tried, *i. e.*, whether appellant was or was not guilty of negligence in operating its cars and in knocking down the telephone wire and leaving it in so dangerous a position. If the wire was dangerous in the position it was in, on account of the liability of being knocked down by the trolley pole attached to passing cars of appellant, it was required to use corresponding care to avoid accident.

The judgment of the court below is affirmed.

Judgment affirmed.

NOTE.—See note to *Clements v. La. Elec. Lt. Co.*, *post*.

**THE CITY OF ALBANY, Appellant, v. THE WATERVLIET
TURNPIKE & RAILROAD COMPANY, Respondent.**

New York Supreme Court, Third Department, Feb., 1894.

(76 Hun, 136.)

INJURY BY ELECTRIC SHOCK.—PROXIMATE CAUSE.

An electric street railway company having the conceded right to use the single trolley plan is liable for injuries only when caused by its negligence. In absence of evidence that it is necessary or usual in the construction of single trolley lines to suspend guard wires over the trolley and span wires, so as to prevent telegraph and telephone wires from falling upon them, the omission of such guard wires is not negligence.

While injury was caused by shock from a telephone wire which broke and fell upon the trolley wire, thus becoming heavily charged with electricity, the proximate cause of the injury was the breaking of the telephone wire, for which the railway company was not liable.

APPEAL by plaintiff from judgment entered upon an order dismissing the complaint at the close of the plaintiff's case, upon the trial of an action to recover damages for the loss of a team of horses killed by the electric shock.

Facts stated in opinion.

John A. Delehanty, for the appellant.

Marcus T. Hun, for the respondent.

MAYHAM, P. J.: This action was prosecuted by the plaintiff to recover damages alleged to have been sustained by the negligence of the defendant in the construction and operation of its trolley for the propulsion of its railroad cars, by reason of which the plaintiff's horses were injured by electricity.

The defendant owns and operates a surface street railroad through Broadway in the city of Albany. At the time

of the alleged injury a violent storm of wind broke or detached telephone or telegraph wires which were elevated above the trolley wire of the defendant's railway, and also the trolley wire of the Albany Railway Company, operating a line of street cars through State street in the city of Albany, which two railway lines intersect each other at the junction of Broadway and State street, in said city; and such broken or detached telephone or telegraph wires fell upon the trolley wire of one of these railroads, at or near their point of intersection, by means of which a powerful current of electricity was transmitted to such broken wire, in which the horses of the plaintiff were, while properly upon such public street, entangled and killed, or seriously injured, by such electrical current. The question as to which of these railroad trolleys connected with the broken wires of the telephone or telegraph companies, and thus furnished the current which produced the injury, was sharply contested on the trial, the plaintiff seeking to connect the defendant's trolley wire with it by the evidence, and the defendant seeking to show that the current came from the electric light wires, or the wires of the Albany Railroad Company. That the injury resulted from a current from one of these powerful electrical agencies was established beyond question, and substantially conceded on the trial, and upon the question as to whether or not the current came from contact with the defendant's trolley wire, or span wires, there was, we think, sufficient evidence to raise a question of fact for the jury.

It is true that no witness traced the telephone or telegraph wire which communicated the current to the horses directly from the horses to the defendant's trolley or span wire, but the witness who cut the wire in which the horses were entangled gave the general direction of the same towards the defendant's trolley and span wires, and the testimony of Hawley and McNamara tends strongly in the same direction, so that if the case had turned upon that point and a jury had found for the plaintiff upon that evidence,

the court would not be authorized to set it aside as wholly unsupported by evidence.

The inference could have been fairly drawn from this evidence that the current was communicated from the defendant's trolley or span wires, and in such case it is for the jury to decide. *Hart v. Hudson River Bridge Co.*, 80 N. Y. 622; *Bernhard v. Rensselaer, &c., R. R. Co.*, 32 Barb. 165; affirmed in 1 Abb. Ct. App. Dec. 131.

But if the jury had found that the current which caused the injury proceeded or was diverted from the defendant's trolley or cross or span wires, still the plaintiff could not predicate the right of recovery upon that fact alone, unless there was some evidence that the defendant was guilty of negligence in the construction or maintenance of its line. The right of the defendant to use electricity as a motive power or energy upon the single trolley plan is not denied, and unless by its negligent use the plaintiff was injured, it cannot complain, and I find no evidence in this case that its use in this instance was not in the manner in which it is ordinarily applied in the propulsion of street cars, and the only precautionary measure suggested by the evidence is by suspending a guard wire over the trolley and span wires, so as to prevent telephone and telegraph wires, suspended above it, from falling upon those uninsulated and highly charged wires, and I find no evidence that such guard wires are either necessary or usual in the construction of single trolley lines for propelling street cars.

Under these circumstances was there any evidence of negligence which the court could have submitted to the jury upon which a recovery could be had? If the proof had established beyond any doubt that the telephone or telegraph wire had fallen upon the trolley wire and thence on the plaintiff's horses, and thus communicated a deadly current to the horses, so long as the trolley, which cannot be insulated, was in its proper place, performing its necessary and proper functions in the propulsion of cars, could it be said to be even the approximate cause of the injury?

Albany v. Turnpike & Railroad Co.

Within the adjudged cases upon this subject in this State we think not.

It is quite clear that the proximate cause of this injury was the falling of the telegraph or telephone wire upon the live trolley wire of one or the other of these lines of railroad. Had not that occurred there is no claim that the electricity from the trolley wire of the defendant's railroad could have communicated with or injured the plaintiff's horses.

The construction and operation of the defendant's railroad by a single trolley power was not the direct, necessary and natural cause of the injury complained of. But for the occurrence of other events, over which the defendant had no control, the injury could not have happened. The doctrine is so old as to be elementary that the injury for which damages are claimed in actions for wrongs, must be the natural consequence of the wrong complained of.

In *Butler v. Kent* (19 Johns. 228), SPENCER, Ch. J., in discussing this principle, uses this language: "In cases of *torts* it is necessary to show that the particular damages in respect of which plaintiff proceeds must be the legal and natural consequence of the wrongful acts imputed to the defendant."

In *Selleck v. Langdon* (55 Hun. 26) the court uses this language: "In an action for an injury the courts cannot go back to the proximate cause, and as between other causes preceding that, select one rather than another upon which to permit a recovery," citing in support of that doctrine *Sellick v. Railroad Co.* 58 Mich. 195; *Daniel v. Balentine*, 23 Ohio St. 532; *McClary v. R. R. Co.*, 3 Neb. 44; *Henry v. R. R. Co.*, 76 Mo. 288; *Ryan v. R. R. Co.*, 35 N. Y. 210.

Wharton, in his work on Negligence, section 73, says: "Negligence is the juridical cause of an injury when it consists of such an act or omission on the part of a responsible human being as, in ordinary natural sequence, immediately results in such injury."

In *Lowery v. Western Union Telegraph Co.*, 60 N. Y. 198, ANDREWS, J., delivering the opinion of the court, in

commenting upon this rule, says : "The law does not undertake to hold a person who is chargeable with a breach of duty towards another with all the possible consequences of his wrongful act.

"It in general takes cognizance only of those consequences which are the natural and probable result of the wrong complained of, and which, in the language of POLLOCK, C. B., in *Rigby v. Hewitt* (5 Exch. 240), may reasonably be expected to result, under ordinary circumstances, from the misconduct.

"Every injury is preceded by circumstances, if any one of which had been wanting, the injury would not have happened. In some sense, therefore, each is a cause of the injury, but to fasten a legal responsibility for the injury upon every person whose wrongful act, however remote therefrom, had contributed to bring about a situation or condition which made the injury possible, would be an impracticable rule and one which, if enforced, would, in most cases, inflict a punishment wholly disproportionate to the wrong."

In *Selleck v. Langdon*, 55 Hun, *supra*, the plaintiff sought to recover for an injury sustained by the falling of a platform on which he was employed to work, occasioned by the prop on which the platform rested being knocked out by vehicles visiting the platform to remove coal, and the court, in reversing a judgment in favor of the plaintiff, after reviewing the authorities upon this question, uses this language: "From these various authorities it may be stated, as the true and guiding rule, that unless the wrong and damage are known to be usually in consequence, the damage according to the ordinary course of events following from the wrong, they will not support an action."

In *Allen v. The Atlantic & Pacific Telegraph Co.*, 21 Hun, 22, the plaintiff sought to recover for injuries resulting from the falling of a telegraph pole which was knocked down by being run against by a runaway team, although the pole was at the time somewhat decayed, and TALCOTT, J., after an exhaustive review of the authorities,

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sums up his opinion in the following words : "If, therefore, the proximate cause of the breaking of the pole, whereby the accident to the plaintiff was occasioned, was the collision with Chubb's team, we do not think the defendant was liable for the consequences of the accident."

Applying the principle of these decisions to the evidence in the case at bar as it appears in the record, we do not think it was error for the learned trial judge to dismiss the plaintiff's complaint.

We have examined the exceptions taken by the plaintiff to the rulings of the trial judge in the receipt and rejection of evidence, and see no error for which the judgment should be reversed.

PUTNAM, J., concurred ; HERRICK, J., not acting.

Judgment affirmed with costs.

NOTE.—See note to *Clements v. La. Elec. Lt. Co.*, *post*.

JOSEPH GRAHAM V. CITY OF BOSTON.

JOHN HARKINS V. SAME.

JAMES MCGONIGLE V. SAME.

JOHN MCGONIGLE V. SAME.

Massachusetts Supreme Judicial Court, Feb. 26, 1892.

(156 Mass. 75.)

INJURY BY ELECTRIC SHOCK.

The fact that the plaintiffs, who were boys, had been playing "tag" just before the first of them came in contact with a live electric wire which the defendant negligently suffered to hang near the street, upon which the other plaintiffs coming to the aid of the first were also injured, does

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not prevent them from recovering against the city under a statute which requires municipal corporations to keep their streets in such condition as to be reasonably safe for "travelers."

APPEAL by defendant from judgments in four actions for personal injuries caused by contact with live electric wires in a street. Report from Superior Court, Suffolk county.

G. A. O. Ernst, for the plaintiffs.

Robert W. Nason and T. M. Babson & R. W. Nason, for the defendant.

ALLEN, J.: The only question reported in these cases for our decision is whether there was evidence to justify the finding of the court that the plaintiffs or any of them were travelers, within the meaning of the statute respecting public ways. Pub. Sts. c. 52, s. 1.

It was held in *Blodgett v. Boston*, 8 Allen, 237, that a person who is using the highway simply for the purpose of play is not to be deemed a traveler. The court dwelt upon the fact that the plaintiff in that case was using the street for a purpose entirely foreign to any design or intent to pass or repass over it for the purpose of travel and confined the expression of opinion to that precise case.

In the present case, the plaintiffs had been upon Warren Bridge looking at the search lights on a man-of-war, and were on their way to their homes in Charlestown, a considerable distance from the bridge, playing tag as they went. There was testimony tending to show that just before the time of the injuries they had stopped to get breath, that Graham walked away from the rest, that he was not running at the time nor was any one in pursuit of him, but that he was walking straight ahead, when he came in contact with the wire; and that, upon hearing his outcry and seeing him in trouble, Harkins went to his assistance and the others went to help Graham and Harkins.

There is not much difficulty in respect to the plaintiffs besides Graham. The evidence tended to show that they

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were then engaged in trying to render assistance, and were not pursuing the game.

As to Graham, the case is closer; but there is evidence that he was actually on his way home, and that he was walking at the moment of receiving the injury. He was rightfully traveling home on the highway. He was not using the highway merely for the purpose of play, but also and perhaps principally for the purpose of getting home. In *Tighe v. Lowell*, 119 Mass. 472, this element was lacking. Amusing himself as he went is not necessarily inconsistent with his being a traveler. *Gulline v. Lowell*, 144 Mass. 495; *Bliss v. South Hadley*, 145 Mass. 91; *Hunt v. Salem*, 121 Mass. 294.

It seems to a majority of the court that upon the evidence the finding of the court as to all of the plaintiffs may be supported.

Judgments for the plaintiffs.

NOTE.—See note to *Clements v. La. Elec. Lt. Co.*, post.
This case is cited in that next following.

PIERRE BOURGET V. CITY OF CAMBRIDGE.

Massachusetts Supreme Judicial Court, May 10, 1892.

(156 Mass. 391.)

TELEPHONE WIRE.—INJURY BY SHOCK.

One who, when traveling upon a city street, stops to pick up, for the purpose of throwing it out of the way, a loose telephone wire hanging so as to endanger travelers, does not by that act lose the protection given to travelers by the statute which permits them to recover against municipal corporations for injuries sustained by defects in streets.

So held, the injuries being caused by electrical shock from a live wire.
Case of this series cited in opinion: *Graham v. Boston*, ante. p. 372.

APPEAL by plaintiff from judgment of Superior Court, Middlesex county, upon a verdict directed for defendant,

in an action for damages under Public Statutes, chapter 52, section 18.

The injury was alleged to have been caused by a telephone wire hanging down upon a sidewalk, and upon and across an electric light wire which was attached to the factory of plaintiff's employer.

It appeared, among other facts, that the plaintiff, while at work near the street, had been told by a girl that she had fallen over a wire and spilled some beans she was carrying, and had asked him for a paper in which to pick them up, and he had directed her to the office to get one. That soon after, having occasion to go from one part of his employer's premises to another, passing along the sidewalk on the way, when he came to the place where the telephone wire lay in front of him on the sidewalk, he saw the girl picking up her beans; that she was on the outer side of the sidewalk from the building, leaving a space of about three and a half feet for him to pass between her and the building; that the wire hung down nearly perpendicularly, with a slant to the sidewalk, where it bent and lay on the sidewalk; and he stooped down to pick it up with both hands, to throw it around the corner of the factory into the yard — to use his language, "I am going to put it on Hughes' land, outside the sidewalk, so it would not be in the way of anybody;" that he was left-handed; that he missed catching the wire with his left hand, and caught it with his right hand about three feet from the end of the wire; that he had no idea or thought that there could be any electrical current in the wire; that he instantly received the electrical current in his hand and body, became senseless, and lay on his back on the sidewalk, with his feet towards the yard space covered with asphalt, with the wire burning into his right hand for some three or four minutes; and that in this way he received severe bodily injuries. The plaintiff, on cross-examination, admitted that there was plenty of room to pass around or step over the wire. It also appeared in evidence that the employment of the plaintiff took him several times a day

to the different buildings of his employer and over the sidewalk at the place where he was injured.

The court ruled that the plaintiff was injured while attempting to remove an obstruction from a highway, and directed a verdict for the defendant.

D. E. Ware, for the plaintiff.

C. J. McIntire, for the defendant.

HOLMES, J.: The question, as presented by the plaintiff's evidence and the ruling of the court, is whether, if one who is traveling in the highway, sees a loose telephone wire hanging so as to endanger travelers, and stoops to pick it up and throw it out of the way, he does by that act lose the protection given to travelers by the statute, so that he cannot recover for a defect in the highway under Pub. Sts. c. 52, § 18. It must be assumed that the jury might have found that the plaintiff was using due care, unless the contrary appears as matter of law, and that the wire charged with electricity was a defect. The fact that the wire belonged to the plaintiff's master is immaterial. *Burt v. Boston*, 122 Mass. 223, 227; *Hill v. Winsor*, 118 Mass. 251, 255.

Our decisions have drawn the line of liability rather favorably for towns, and the case at bar comes pretty near the line; but we are of opinion that the plaintiff ought to have been allowed to go to the jury. It is plain that the mere fact that he stopped momentarily—if he did, which is not clear—would not deprive him of his rights as a traveler, *Bliss v. South Hadley*, 145 Mass. 91, 94; *Varney v. Manchester*, 58 N. H. 430; *Duffy v. Dubuque*, 63 Iowa, 171. If he was a traveler, the mode of his coming into contact with the defect is not material, if it was not negligent. The fact that he voluntarily took hold of the wire no more prevents his recovery than his voluntarily brushing against it, or voluntarily walking over a pitfall. It may be said, no doubt, that such voluntary handling of the wire, even if not negligent, is not incident to the use of the highway for

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purposes of travel ; and that therefore, if harm comes of it, it should not be imputed to the traveler, nor give rise to liability, although the cause of the harm was a defect for which the city would have been liable if it had interfered with travel, and had done the damage in that way. We agree that cases of benevolent intermeddling by a volunteer can be put, in which he would take the risk of any harm that might befall him. For instance, if a man should come with carts and bricks and mortar to make serious changes and repairs. But it seems to us that to throw on one side, out of the way of travel, either with one's stick or one's hands, a light, movable object, which is an annoyance or nuisance where it is, is one of those every-day acts of kindly feeling which fairly may be said to be an incident of travel, as it commonly goes on, and to be within the protection of the law. *Babson v. Rockport*, 101 Mass. 93, 94; *Britton v. Cummington*, 107 Mass. 347; *Gulline v. Lowell*, 144 Mass. 491; *Graham v. Boston*, ante (156 Mass.) 75.

Exceptions sustained.

NOTE — Upon a second appeal in this case, reported 159 Mass. 388, it appeared that the wire with which the plaintiff came in contact was an acoustic wire, but that it touched an electric wire which had lost its insulation at the point of contact. The wire had been hanging loose for three weeks, in such a position that the wind might bring it against the electric wire. At the time of the accident it was caught on a glass insulator, and held in contact. The want of insulation of the electric wire could be seen from the street. There had been another accident from the same cause a few minutes before the one in question. Held, sufficient evidence to submit to the jury that the defendant ought to have known of the defect.

See note to *Clements v. Lu. Elec. Lt. Co.*, post.

THE AUGUSTA RAILWAY COMPANY V. CHARLES ANDREWS.*Georgia Supreme Court, May 25, 1892.*

(89 Ga. 653.)

INJURY FROM ELECTRIC SHOCK.—TRESPASSER.—PLEADING.

While electric companies must see to it, up to the measure of full diligence, that the public is protected, upon the streets, from the danger of contact with its wires when charged with the deadly electric fluid, nevertheless, one who leaves the street and climbs a pole supporting wires, without permission from or notice to the company whose system he has thus entered upon, and is injured by reason of the contact of that company's wire with the feed wire of another company, can recover from neither.

Demurrer to complaint setting up no more than the above allegations, sustained.

APPEAL from judgment of Richmond City Court. Appeal from judgment overruling demurrer. Facts stated in opinion.

J. S. & W. T. Davidson, for plaintiff in error.

Twiggs & Verdery, contra.

SIMMONS, Justice: According to the declaration, there was in the city of Augusta, at the time of the alleged injury, a system of electric wires operated by the defendant, the Augusta Railway Company; there was also another system, consisting of the fire alarm wires of the Augusta fire department; and the plaintiff was employed in putting up wires for a third, that of a telephone company. In stringing the wires on the poles it became necessary at a certain point for the plaintiff to place the telephone wire above and across the fire alarm wire, and for that purpose he ascended a pole of the fire alarm sys-

tem, to the height of the wire, and, while attempting to place the telephone wire over and across the fire alarm wire, received from the latter a shock which caused him to fall to the ground, a distance of some twenty-three feet, by which means he was seriously injured. He charges that his injuries "were caused solely by the carelessness of the defendant company in so negligently constructing, using, and operating what is known as its "feed wire" * * * as to permit and allow the same to come in contact with said fire alarm wire, at the intersection of two named streets of the city, "and negligently and carelessly failing to separate, and keep separated, at a safe and proper distance, its said feed wire and said fire alarm wire, at the time and point indicated;" "that there was being transmitted over said feed wire, at the time petitioner received said injuries, a powerful and deadly current of electricity, used to propel the cars of the defendant, which current was carried over said fire alarm wire from said point of contact to the place where petitioner was working as aforesaid, and thence into and through his body;" and that the "fact of contact of said feed wire and said fire alarm wire was known, or by proper diligence might have been known, to the defendant." The declaration was demurred to on several grounds, one of which was that it set out no legal cause of action. The demurrer was overruled, and the defendant excepted.

Whether, so far as concerned the safety of the public who pass along the streets and under the wires, it was the duty of the railway company or of those in charge of the fire alarm system, or of both, to place guard wires under and over their electric wires, to prevent contact, it is unnecessary now to decide. Under the facts alleged, we are clear that the plaintiff was not entitled to recover. He does not allege any fact going to show that the defendant company was under any duty or obligation to protect him at the time or place of the injury. He does not allege that he had permission from those operating or in charge of the fire alarm system to climb its poles in the prosecution of his business. Without permission, and without notice, even, so far as

appears from this declaration, he climbed the pole, and became a trespasser upon the fire alarm system. He had no right to go upon the pole without permission, and, when he did so, he took the risk incident to the trespass. If he had obtained permission from those in charge of the fire alarm system to climb their poles to carry on his business, he would have been in a position somewhat analogous to that of a servant of the licensors, and if, while acting in pursuance of the license, he had been injured by the negligence of the railway company, he might be entitled to recover. Or if he had been upon the street, or in any place where he had a known right to be, and had been injured by the negligence of the railway company, he would be entitled to recover. Whatever may be the reciprocal duties of electric companies between themselves, as to guard wires, etc., each must see to it, up to the measure of full diligence, that the public is protected, upon the streets, from the danger of contact with its wires when charged with the deadly electric fluid. If a person, however, leaves his proper place in the street or highway, and climbs a pole 23 feet high, which supports an electric wire, taking with him a wire to throw across the one on the pole, and does this without permission from the company whose system he has thus entered upon, and by reason of the contact of that company's wire with the "feed" wire of another company, is injured, he cannot recover from either company. If the plaintiff had given the railway company notice that he was going up the pole, or if it had reasonable grounds to believe that he was on the pole, and it had known or ought to have known that its wire was in contact with the other wire, it might be liable to him for injuries received by him on account of its negligence. But the plaintiff does not allege that the defendant had notice of his being on the pole, or that it had any grounds for believing that he would be on the pole. We therefore think that, in any view of the case, the court should have sustained the general demurrer and dismissed the action.

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As the court should have sustained the demurrer, all the subsequent proceedings were erroneous, and it is not necessary to discuss them.

The rule of practice in relation to motions for new trial before the trial court is sufficiently set out in the first head note.

Judgemnt reversed.

NOTE.— The complaint in this action was afterward amended by alleging facts showing that when the plaintiff was injured he was not a trespasser, but was upon the pole by permission of the owner, and that his presence there should have been anticipated by the defendant. The second appeal, the decision upon which was reported 92 Ga. 706, related to the pleading thus amended. It was held sufficient.

See note to next case.

**DENNIS CLEMENTS AND WIFE V. LOUISIANA ELECTRIC
LIGHT COMPANY.**

Louisiana Supreme Court, May 2, 1892.

(44 La. Ann. 692.)

**ELECTRIC LIGHT WIRE.— DEFECTIVE INSULATION.— INJURY BY SHOCK.—
CONTRIBUTORY NEGLIGENCE.**

(Head-note by the court):

The violation of a duty specified by law is negligence; therefore, when a city ordinance under which an electric lighting company is operated requires it to have the "splices" on its wires perfectly insulated, the failure to do so is negligence.

A person whose occupation brings him in proximity to the company's wires has a right to believe that the wires have been insulated and the ordinance complied with. He is required to look for patent defects in the insulation only. If, not aware of a latent defect, he comes in contact with the wire, and is injured without fault on his part, the company is responsible.

When the action of both parties must have concurred to produce the injury, it devolves upon the plaintiff to show that he was not himself guilty of negligence. This proof need not be direct, but may be inferred from the circumstances of the case.

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Where an electric wire is stretched over a roof, and a party goes on the roof to repair it, and the wire is of that height above the roof that the chances are that he will come in contact with it by going under it, or stepping over it, it is not negligence to pursue either mode of crossing, if he exercises all necessary and prudent care to protect himself, in proportion to the danger.

When a person is employed in the presence of a known danger, to constitute contributory negligence it must be shown that the plaintiff voluntarily and unnecessarily exposed himself to the danger.

APPEAL by defendant below from judgment of Civil District Court, Parish of Orleans, awarding plaintiffs damages for the death of their son. Facts stated in opinion.

J. R. Beckwith and J. B. Fisher for plaintiffs and appellees.

Farrar, Jonas & Kruttschnitt, for defendant and appellant.

The opinion of the court was delivered by McENERY, J.: Joseph Clements was killed on the 4th day of October, 1890, by an electric current from the wires of the defendant company, while engaged in repairing the gallery roof at the corner of Gravier and Camp streets, in the city of New Orleans.

The plaintiffs, the father and mother of the deceased, sue the defendant company for the death of their son.

There was judgment for the plaintiffs for \$5,000, and the defendant appealed.

Joseph Clements was a tinsmith by occupation. He had been employed to go on the roof of the gallery to repair the same by a contractor.

He was accompanied by another young man, Alfred Anderson.

In half an hour after they went on the roof Clements was killed by coming in contact with defendant's wires. Two of defendant's wires run up and down Camp street, over the roof of this gallery.

They were 2 feet 4 inches above it. They were some 17 inches distant from each other, and the inside wire was about 4 feet from the Camp street edge of the gallery.

The wires were fastened to a support or "horse" on the gallery, and the inside wire, to prevent its contact with the other wires, was secured to the horse by a piece of telephone wire.

Between the horse and the Gravier street side of the gallery there was, on the inside wire, a joint covered with insulating tape. To all appearances it was in good condition, but it had been worn by the exposure to the weather, and had evidently lost some of its insulating properties.

The defects, however, were not visible, but were exhibited during a storm, as shown by the testimony of S. W. Bennett. From his testimony, it is shown that the insulating tape had been defective for a considerable time. He occupied a room fronting on the roof, and forbade his employes from going on it, on account of the want of proper and safe insulation over the wires.

Clements and his companion were engaged in cleaning the roof, the first in sweeping and the other in carrying off the dirt.

The fatal injury to young Clements was rapid in its results; so quick in execution that no witness, not even the witness who was on the roof with him, was able to state with precision his position when he received the shock from the wire. But we think, from all the attendant circumstances, that he was either stepping over the wire or going under it. It is probable that he came in contact with both wires, making a short circuit, increasing the energy of the electric force. The unprotected or uninsulated places which were not visible on the splice in the wire came in contact with his body under the right shoulder blade.

The wires were so close to the roof that, to pass from where Clements was first seen sweeping, to the gutter, he must either have stepped over or crawled under.

From the distance of the wire above the roof, to step over would in all probability have brought Clement's body in

contact with one or both wires. He was only of medium height, and to step two feet four inches would require not only exertion, but some skill to keep clear of touching the wires.

It is in evidence that about the time the accident occurred there was considerable leakage on defendant's line of wires, and this is urged as evidence of neglect on the part of defendant, because it showed defective insulation.

But the general defect along the defendant's line cannot be evidence of want of due diligence and care. It must be shown that the accident was occasioned by some defect at the point where the injury was inflicted. *Nivette v. Lake Railroad Company*, 42 An. 1153.

We are aware of the difficulty which confronts the defendant company in keeping its many wires, passing over a large territory, to great distances, in a condition of perfect insulation. Parts of the line will necessarily become uncovered, and all that can be expected is that the company will inspect its lines, and repair defects as early as practicable. The particular defect in insulation in this case which is complained of was of long standing, and by a careful inspection of its lines it would have been brought to its notice.

By city ordinance 806, Council Series, the legal duty of the defendant is specified.

Section 8 of the ordinance provides that all splices or joints, wherever the same may occur, shall be thoroughly soldered, after such joint or splice is made, and, in addition thereto, shall be well and thoroughly wrapped with kerite tape or other insulating material, so as to produce perfect insulation at such joint or splice. This ordinance was a contract with each and every inhabitant of the city. The defendant's standard of duty was fixed by it, and it is the same under all circumstances, and its omission is neglect.

The first requirement of the plaintiffs was to show the existence of this duty which they alleged had not been performed, and having shown this, they must show a failure

to perform the duty, and thus establish negligence on the part of the defendant.

It is an affirmative fact, the presumption being, until the contrary appears, that every person will perform the duty enjoined by law or imposed by contract. Cooley, Torts, 659, 661.

In many cases evidence of the injury done makes out a *prima facie* case ; for instance, where a bailee returns in an injured condition an article which has been loaned to him, or where a passenger on a railway train is injured without fault on his part.

The city ordinance does not specify at what particular localities splices shall be perfectly insulated. On all parts of the line of defendant company where they occur the duty is specified.

The wire of defendant was spliced, and was not insulated, as required by the ordinance. It passed over a roof, to which people in adjoining rooms had access, and where, in the course of time, mechanics must go to make repairs, or laborers to sweep off or clean the roof.

It was the duty of the company, independent of any statutory regulation, to see that their lines were safe for those who by their occupations were brought in close proximity to them.

In this respect, and in this particular case, we are of the opinion that the defendant's negligence caused the death of Clements.

But notwithstanding this fault of defendant, if the evidence shows that the plaintiff himself was guilty of negligence contributory to the injury, he cannot recover.

The question is whether the act of the party injured had a natural tendency to expose him directly to the danger which resulted in the injury complained of.

If the plaintiff could, by the exercise of reasonable care, at or just before the happening of the injury to him, have avoided the same, he cannot recover damages for the injury.

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When the action of both parties must have concurred to produce the injury, it devolves upon the plaintiff to show that he was not himself guilty of negligence.

He must show affirmatively that he was in the exercise of due and reasonable care when the injury happened. 40 An. 787; 83 Ill. 354; 19 Conn. 566; 78 N. Y. 480; 101 Mass. 455.

This proof need not be direct, but may be inferred from the circumstances of the case. 104 Mass. 137; 41 An. 964; 2 Thompson, Negligence, 1178.

The deceased, Clements, was lawfully on the gallery roof. He was engaged in a service that necessarily required him to run the risk of coming in contact with defendant's wires, either by stepping over them or going under them. It is probable that the latter mode was the most convenient, and there is no evidence that in so doing he incurred any greater risk.

The wires were visible, and to all appearances were safe.

The great force that was being carried over the wires gave no evidence of its existence. There was no means for a man of ordinary education to distinguish whether the wire was dead or alive. It had all the appearance of having been properly insulated. From this fact there was an invitation or inducement held out to Clements to risk the consequences of contact.

He had a right to believe they were safe, and that the company had complied with its duties specified by law.

He was required to look for patent, and not latent, defects. Had he known of the defective insulation, and put himself in contact with the wire, he would have assumed the risk.

The defect was hidden, and the insulation wrapping was deceptive. It is certain, had it been properly wrapped, Clements would not have been killed. His death is conclusive proof of the defect of the insulation and the negligence of the defendant.

He exercised reasonable care in going under the wire in the performance of his duty, as he had a right to believe,

from external appearances, that the wire was safe. His action was such as not to tend to expose himself directly to the danger which resulted in the injury. In fact, there was no apparent danger.

But it is urged that Clements was cautioned to keep away from the wires by his employer, Brady, and his failure to do so was gross carelessness on his part.

The evidence on this point is as follows :

“Q. Did you call Clement’s attention to the wires ?

A. No, sir ; I cautioned him to be careful of the wires. Every man goes over a roof must keep away from the wires.

Q. It is the business of a man who goes over a roof to keep away from them ?

A. Yes, sir.

Q. Did he understand that business ?

A. Yes, sir.

Q. Did you caution him that morning to keep away from the wires.

A. Yes, sir.”

Clements’ attention was not directed to any particular danger from the wires. No apparent defect was pointed out to him.

The admonition to him was only of a danger which he knew to exist, according to the statement of Brady, before he advised him to be cautious of going near the wires, or to keep away from them.

There was only that instinctive dread of danger which overtakes one when he approaches a railroad track. The track in itself is not dangerous, and is only made so by the passage of a train of cars over it. They announce their approach, and hence a person, before he attempts to cross the track, must exercise great caution, stop and listen, and look up and down the track. Having done this, if a train approaches silently, without the accustomed signal, and injures him, he would be entitled to recover damages for the injury. *Curley v. Railroad Company*, 40 An. 817; *Brown v. Railroad Company*, 42 An. 350.

The electric wires gave no signal of danger. Listening would not have revealed any danger. It is hidden and silent. But they are disarmed of danger, if properly insulated. By looking, one can see if there are evidences of insulation.

If there are evidences of it, and no defects are visible after careful inspection, one whose employment brings him in close proximity to the wire, and which he has to pass, either over or under it, is not guilty of contributory negligence by coming in contact with it, unless he does it unnecessarily, and without proper precautions for his safety.

It cannot be said that when Clements went on the roof to repair it he went into the presence of known danger, and assumed the hazards of the employment.

The employment was not dangerous. The wires, if properly insulated, as above stated, would have been harmless. It was only a remote danger, which he had to risk, and this depending upon the fact whether or not the defendant company had done its duty as specified by law. The external appearances, the only indication of performed duty to which Clements' attention could be fixed, were guaranties that the defendant company had done its duty. These appearances assured him that, in the performance of his work in sweeping the roof, it was not dangerous for him to risk going over or under the wire. *Bomar v. Railroad Company*, 42 An. 983.

Even in the presence of a known danger, to constitute contributory negligence it must be shown that the plaintiff voluntarily and unnecessarily exposed himself to it, unless it is of that character that the plaintiff must assume the risk from the very nature of the danger to which he is exposed.

From the appearance of the wire, its wrapping with insulated tape, and the known duty of the defendant to protect the insulation of this particular splice or joint, Clements had no reason to anticipate danger, except from the fault of the defendant company.

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This fault was the cause of his death, and his act in passing under or over the wire was too remote to give it the character of contributory negligence.

* * * * *

NOTE.—The foregoing ten cases are similar in the respect that all are brought for the recovery of damages on account of injury by electric shock. The only cases thus arising, previously reported in this series, may be found at pp. 477 and 491 of vol. 8.

CHARLES UGGLA v. WEST END STREET RAILWAY COMPANY.

Massachusetts Supreme Judicial Court, Jan. 4, 1894.

(160 Mass. 351.)

INJURY BY ELECTRICAL APPLIANCE.—NEGLIGENCE.

An iron ear used to attach a guy to a trolley, to keep the latter in position around a curve, having broken, a portion fell upon and injured the plaintiff. Held, that an instruction to the jury that upon this fact, standing alone, they should find the defendant negligent, was proper.

APPEAL by defendant from judgment of Superior Court, Suffolk county, upon a verdict for plaintiff. Facts stated in opinion.

M. F. Dickinson, Jr., and W. B. Sprout, for the defendant.

J. D. Long and C. E. Todd, for the plaintiff.

BARKER, J.: The plaintiff, while driving on Park Square, in Boston, was struck by a broken iron attached to a wire

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guy. The iron was part of an ear, used to clasp a trolley wire and apply to it a strain from the guy, in order to keep the trolley wire in place around a curve and over the defendant's track. The ear broke with the strain, and one part of it fell, striking the plaintiff on the head. As to these facts there was no dispute at the trial, and there was no other evidence that the defendant was in fault. There was, however, other evidence, introduced by the defendant, that it was not guilty of negligence, tending to show that the break was a clean break, bright in color and appearance, and that the iron was sound all through, with no flaw or defect in it, and also that the whole apparatus was manufactured and put up by a manufacturer of the highest reputation ; that the ear and guy constituted the best and strongest device known at the time for keeping trolley wires in place ; that the defendant employed a corps of competent superintendents, foremen, and inspectors, who inspected the whole line weekly, including the cars and their attachments ; and that this particular part of the line had been inspected within a week prior to the accident.

The exceptions taken were to certain portions of the charge to the jury, which the defendant contends were wrong in two respects ; first as to the weight which the jury should give to the happening of the accident itself as evidence of the defendant's negligence ; and next because the charge held the defendant to too high a degree of care.

1. The part of the charge which the defendant contends is objectionable on the first ground is the sentence in which the presiding justice, after having recited the manner in which, as was conceded, the accident occurred, and having said that if nothing further appeared it would be competent for the jury to find negligence on the part of the defendant, further said, "The plaintiff must prove negligence, but when he proves the facts to which I have called your attention, and nothing else appears in the case, a jury may well find, and should find, negligence on the part of the defendant corporation." In our opinion, this was a

correct statement of the law. No one but the defendant was responsible for the safety of its apparatus, and from the circumstances of the accident it would not be reasonable to infer that it was due to the careless or wilful act of any third person, or to any cause except the failure of the apparatus to support the strain to which it was subjected in the use for which it was designed and which was made of it by the defendant. If the defendant should offer no explanation of the breaking, and no evidence that it had taken pains to make the apparatus safe, the only proper inference would be that it had not taken reasonable care to make the apparatus safe, and the jury should find negligence on its part.

Aside from this, the charge was not open to exception because of the sentence quoted, for the reason that the sentence, other facts than those with which it dealt having been testified to, did not purport to give the rule which the jury were to apply to the question of the defendant's negligence, but was a preliminary statement calling the attention of the jury to the degree of weight and importance to be attached to certain admitted facts (see *Durant v. Burt*, 98 Mass. 161, 168), and the charge further clearly instructed them to consider the question of the defendant's negligence in the light of all the evidence in the case.

2. The charge was correct in its statement of what would be reasonable care on the part of the defendant. The jury were instructed that in determining that question they should "take into consideration, as one of the most important things, the apparent danger—what would be likely to happen if there was a failure to use proper care. If the danger is a danger of causing the loss of life, causing death or serious bodily injury to persons traveling upon the street," they were told they might "properly say that reasonable care would be a high degree of care, because it would be the degree of care commensurate with the apparent danger." These instructions were in accordance with the rule often stated by this court, as in *Hutchinson v. Boston Gas Light Co.*, 122 Mass. 219, 222, "that the vigi-

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lance and attention required must conform to the nature of the emergency and the danger to which others may be exposed, and is always to be judged of according to the subject matter, the danger and force of the material under the defendant's charge."

Exceptions overruled.

NOTE.—See note to *Cleveland v. Bangor St. Ry.*, post.

**SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY ET
AL. V. JOHN T. CRANK.**

Texas Court of Civil Appeals, January 17, 1894.

(27 S. W. R. 38.)

INJURY BY TELEPHONE WIRE OVER RAILWAY TRACK.

A brakeman having been injured by being swept from the top of a car where he was, in the line of his duty, without negligence on his part, held, that both the telephone company which negligently maintained the wire suspended too low, and the receiver of the railroad company, which employed the plaintiff, were jointly liable for the injury, and that the latter could not recover over from the former.

APPEAL by defendants from a judgment for personal injuries for negligence, rendered at District Court, Grayson county. Facts stated in opinion.

Head & Dillard, for appellant Dillingham.

John W. Wray, for appellant, Southwestern Telegraph and Telephone Company.

Randell & Wolfe, for appellee.

LIGHTFOOT, C. J.: The following statement is substantially correct: Appellee was in the employ of certain railway companies hereinafter named. In his amended pleading, filed July 15, 1891, in said cause, he made Charles Dillingham, receiver of the Houston & Texas Central Railway Company, the Ft. Worth & New Orleans Railway Company, the Texas Central & Northwestern Railway Company, and the telephone company, joint defendants. He alleged his employment as brakeman on a construction train, and further alleged that he was in their general employment and service, and also of defendant, Central Texas & Northwestern Railway, and while so engaged in the scope of his duties, and while standing on the top of a moving box car on or about July 16, 1890, in the city of Waxahachie, Ellis county, Tex., he collided with a telephone wire where the same crossed said Ft. Worth & New Orleans Railway, and was thrown to the ground, and permanently and painfully injured, etc. Appellee charged that the consequences were produced (1) by the gross negligence of defendants' railways and said receiver "in running and causing to be run, and permitting said train of cars on said railway track under said wires, which were too low for a train to pass with safety to those upon it, and constructing, operating and maintaining said railway under said wire, and permitting said wire to be too low; (2) by the gross negligence and want of ordinary care on the part of the telephone company in placing, keeping, using, and maintaining said wire over and too near said railway track, regardless of the safety," etc., "and in the improper construction and want of repair of said wires;" (3) The joint wrong consisted in such want of proper construction and want of repair of the telephone wires, and the operation of the train on the railway track, and the condition of the track, etc., "that the condition of the line of wire and railway was known to the defendants, or could have been known," etc., but was unknown to appellee. Defendant Dillingham's amended answer consisted of: First, general demurrer; second, general denial; third, that appellee

had notice of the condition of the wire, and assumed all risks therefrom, and was guilty of contributory negligence in not avoiding injury; fourth, that if the appellee sustained injury through the negligence of either of the defendants, it was through the negligence of the telephone company in constructing and maintaining its wire too low, and permitting one of its wires to become loose and hang down, as alleged in plaintiff's petition. He prayed, in case judgment was rendered against him, that he have judgment over against defendant telephone company. Defendant telephone company's amended answer consisted: First, of general demurrer; second, special exception, contending there was no joint injury shown, no co-operation, etc., as to the injury and supposed acts of negligence, to make defendants jointly liable, etc.; third, a general denial; fourth, notice of the condition of the wire, and the assumption by appellee of the risks and hazards incident to his employment; fifth, contributory negligence on the part of the appellee, on account of his knowledge of the condition of the wire, and means of knowledge at hand, and his failure to exercise that degree of care that an ordinarily prudent man would exercise under like circumstances, whereby he proximately contributed to his supposed injuries; sixth, defendant's plant in said Waxahachie was erected and constructed as long experience had demonstrated was fit and proper, and as similar systems are and have been erected; that the plant was in the lawful use of the street upon which it was erected, and was so built and constructed as not to incommode the traveling public in the legitimate and lawful use of said street; that the wire had been erected in 1883, and defendant since that time used all reasonable effort, and such as is ordinarily used, to keep said wire in condition, as was incumbent upon defendant. It further answered, if the wire was too low to permit a person standing upon the top of a box car to pass safely underneath, it had no knowledge thereof; and, answering pleading of its co-defendant Dillingham for judgment over and

against it, it demurred generally to said receivers' pleadings, and, for plea in bar, said it made all of the allegations embraced in the preceding plea in bar a part of its answer to said receiver's plea, and, in addition thereto, said further that said railway was constructed long subsequent to defendant's line of wire and plant in said city; that it was constructed and erected with due care, and so as not to incommode the public in the use of the streets, and that it had no knowledge that the wire was too low, if such was the fact; that its co-defendants had used and operated the line of railway underneath said wire for about five years without murmur or objection; that the managers of said railway and employes had peculiar means of knowledge by reason of the fact that they continually operated their train beneath the wire, and knew of its condition, and that the defendant telephone company was without knowledge of any character that said wire was too low, if it was, and, if too low, defendant railways ought to have notified appellant telephone company. Defendants Central Texas & Northwestern and Ft. Worth & New Orleans Railways filed pleas in abatement, special demurrers reaching the question of jurisdiction of the District Court of Grayson county, also touching the question of a joint wrong, insisting there was not such as would authorize a joint cause against all the defendants' general denial, and special plea in bar, in substance such as their co-defendant Dillingham had filed September 30, 1891. A trial before a jury resulted in a verdict and judgment in favor of the last two named defendants on their plea in abatement, and in favor of appellee against defendant Charles Dillingham, receiver, and the Southwestern Telegraph & Telephone company, for the sum of \$6,500, denying judgment over against the telephone company in favor of defendant Dillingham. From this judgment both the defendant Dillingham, receiver, and the telephone company have appealed.

The facts, as found by us under the evidence, are substantially as follows: At the time of the inquiry, July 16, 1890, appellee, John T. Crank, was a brakeman on a con-

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4. The verdict and judgment are amply sustained by the facts proved, and we think the justice of the case was reached, and the judgment is affirmed.

NOTE.—See note to next case.

LENA T. CLEVELAND V. BANGOR STREET RAILWAY.

Maine Supreme Judicial Court, Feb. 14, 1894.

(86 Me. 232.)

ELECTRIC STREET RAILWAY.—MAINTENANCE OF POLES.—FRIGHTENING HORSE.—NEGLIGENCE.

The facts that a street railway company has legislative authority to operate its cars by the overhead trolley electric system, and has located its poles under municipal direction authorized by law, do not in absence of any provision of law to that effect, absolve it from liability for negligence in the maintenance of its poles.

In the case at bar, it appeared, however, that by a general law, companies maintaining poles for electrical purposes were liable for injuries caused thereby, and municipal corporations were not by said law absolved from liability for injuries caused by poles in highways; and by its charter the defendant company was obliged to indemnify the city against such liability.

Verdict for plaintiff in action for personal injuries sustained.

ACTION for damages for personal injury. Plaintiff's horse being frightened at an electric car operated by defendant, shied, the carriage was thrown against one of defendant's poles, and plaintiff sustained injuries. It was claimed that the pole was an unlawful obstruction.

Appeal by defendant below.

The city ordinance of Bangor is as follows:

Chapter 40, § 1. "Bangor Street Railway, a corporation duly established by law, * * * is hereby authorized and licensed to locate, build equip and maintain a street railway in the city of Bangor, for the sole

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purpose of transporting passengers and their baggage, cars to be run by electrical or animal power, and to locate and maintain single or double lines of poles on any street where its tracks may be laid, etc.

Sec. 8. But no poles shall be placed or wires strung until the location of such poles and wires shall be approved by the mayor and street engineer.

The material parts of defendant's charter are given in the opinion.

Charles P. Stetson and P. H. Gillon, for plaintiff.

Langhton, Clergne & Mason, for defendant.

LIBBEY, J.: Case to recover for a personal injury which the plaintiff alleges she received on Exchange street, Bangor, by reason of the negligence of the defendant in erecting and maintaining a pole to sustain its trolley wires, at such a point and in such a manner in said street as to make it dangerous for public travel.

In his charge the court instructed the jury as follows: "The plaintiff must prove first that this defendant company was at fault in the particular thing complained of, that the defendant company fell short of the duty of a prudent, careful man, that they did not have that regard for the public safety and for the chances of accident that they should have had as prudent men and managers.

"Second. She must prove that this particular fault of the defendant's, which she claims to have shown you, caused her the injury of which she complains. Because, of course, if this fault of the company did not cause her the injury, she has no cause of complaint against them.

"She must prove the defendant's fault, that the defendant's fault caused the injury, and also prove besides that no fault of hers, or of the person in whose care she was at the time, contributed to the injury, or helped cause it.

"I further instruct you that they were bound in so placing them to have due regard to the rights of the public, and to have had due forethought as to the needs of the public and the danger to the public, and that they were so

bound in placing their posts as to not unnecessarily or unreasonably endanger any person traveling in that vicinity.

"I will add this: That the defendant might, perhaps, have been justified in putting the pole there, at the time they placed it there, and not have been justified in maintaining it there, afterwards; and they may have been in fault in the placing as well as in the maintaining. * * * Assuming the defendants to be thoughtful, careful and watchful men, if it became apparent after the pole was placed there that it was in a dangerous place and was doing harm, they would then be bound to rectify the mistake if it was one."

The defendant, however, contended that if it located and maintained the pole in question in the public street in accordance with the provisions of its charter and the ordinance of the city of Bangor, it was legally justified; and proof of negligence in doing so would not subject it to an action by a traveler damaged thereby; and requested the court to instruct the jury as follows: "That if the pole in question was located and maintained in accordance with the provisions of the charter of the company and the ordinance of the city licensing the company to erect and maintain poles, then the pole was not a legal obstruction, and the plaintiff cannot recover." This request was not given, and was properly refused as not expressing the law of the case.

A careful examination of defendant's charter and the city ordinance discloses nothing which expressly or by implication relieves the company from liability for injuries caused by negligence or want of care in erecting and maintaining its poles when licensed by the city council, but rather the contrary. Section four of the charter creates a lien on all property of said railway, to take precedence of any mortgage, in favor of the city of Bangor to secure said city for any sum it may be liable to pay on account of any damages to person or property occasioned by any negligence or fault of said railway during construction or operation.

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The case seems to be within the provisions of statute of 1885, chapter 378.

Section 1. Every company incorporated for the transmission of intelligence, heat, light or power by electricity ; and all persons and associations engaged in such business, shall be subject to the duties, restrictions and liabilities prescribed in this act.

Sec. 8. When an injury is done to person or property by the *posts*, wires, or other apparatus of any company, person or association mentioned in section one, such company, person or association shall be responsible in damages to the person injured. If the same be erected on a highway or town way, the city or town shall not by reason of anything contained in this act. or done thereunder, be discharged from its liability.

The law as stated in the charge, requiring the plaintiff to prove the damage to be from the negligence or fault of the defendant, was sufficiently favorable to it.

A careful examination of the evidence reported satisfies us that it was sufficient to authorize the verdict.

Exceptions and motion overruled.

NOTE.— In the three cases preceding this note, the causes of action were for injuries from electrical appliances, but not due to shock, nor to negligence in the management of electric railways, the latter being under consideration in a subsequent series of cases in this volume. The following are abstracts of opinions in cases of the same general nature :

In *Arkansas Telephone Co. v. Ratteree*, Arkansas Supreme Court, March 18, 1892 (57 Ark. 429), the action was for damages for injuries caused by the servants of a telephone company letting a wire fall in a street, thus causing the plaintiff's horse to jump and throwing plaintiff from the wagon. Held, that the above facts were *prima facie* proof of negligence. The plaintiff was in the rear of his wagon, the horse standing in the street, and a deaf mute boy being left on the seat. Held, that the question of contributory negligence was one to be left to the jury.

In *Johnson v. N. W. Teleph. Exch. Co.*, Minnesota Supreme Court, June 29, 1893 (55 N. W. Rep. 829), the injuries for which the action was brought were caused by the falling of a telephone pole on account of the cutting of the guy wires by the owner of a building to which they had been attached. It was held that the evidence in the case did not require a finding that the fall of the pole was due to the manner in which the guy wires were removed.

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In *Postal Tel. Cable Co. v. Zopf*, Tennessee Supreme Court, Jan. 18, 1894 (24 S. W. Rep. 688), the action was brought to recover for injuries caused to plaintiff's daughter by falling upon a pole which defendant had left in a highway, preparatory to erecting it. The pole lay in such a position that to pass directly from the road to the gate leading to plaintiff's house it was necessary to cross it. Judgment upon verdict for plaintiff affirmed.

MARY FLOOD, as administratrix, &c., Respondent, v. THE
WESTERN UNION TELEGRAPH COMPANY, Appellant.

New York Court of Appeals, March 1, 1892.

(131 N. Y. 603.)

INJURY TO EMPLOYE OF TELEGRAPH COMPANY.

A telegraph company does not insure the safety of its employees. They assume the known and ordinary risks of their employment, and are bound to know that the cross-arms of telegraph poles are not intended to bear a man's weight.

A lineman, who had been in the employment of a telegraph company for many years, as lineman and as inspector, and was familiar with its appliances, by bearing his whole weight upon a cross-arm, broke it, was thrown to the ground and killed.

The company was not shown negligent in either the erection or maintenance of the arm.

Held, that no cause of action arose to the personal representative of the lineman by reason of his death thus caused.

APPEAL from judgment of General Term, Third Department, entered upon an order affirming a judgment for plaintiff upon a verdict and an order denying motion for a new trial. The facts sufficiently appear in the opinion.

Louis Marshall, for appellant.

A. T. Benedict, for respondent.

EARL, Ch. J.: The plaintiff seeks to enforce liability upon the defendant for the death of the intestate because of its

negligence as to the cross-arm which broke under his weight. We have carefully read and weighed the evidence contained in this record and are unable to find any showing culpable negligence adequate to sustain this judgment.

The defendant did not insure the safety of its employes. It was bound only to use reasonable and ordinary care to provide for them a safe place to do their work, and they assumed the ordinary risks of the employment in which they were engaged. The cross-arms of telegraph poles, manifestly from their usual size and strength, are not intended to bear the whole weight of any person, and yet the evidence shows that persons engaged in fixing them and placing wires upon them, do sometimes rest their weight upon them. It must always be a hazardous venture for a man to sit on the outer end of one of these cross-arms engaged in pounding near the end with a hammer. When the arm is new and perfect this may be done with safety. But it must always be attended with great danger, and it is unnecessary, as the work can be done without resting the whole weight upon the arm.

There was no negligence in furnishing and putting up this arm originally. It was of the material and of the size and apparent strength and safety then in use by all telegraph companies, and so far as appears, such arms have been found adequate for any purpose. For some time before the accident the defendant had been using larger and stronger arms to carry heavier wires, and only for that purpose. There was a system of inspection for the arms when purchased, and it does not appear that there was anything in the external appearance of this arm when new which indicated any defect or weakness, or that there was any defect therein discernable by any ordinary inspection.

This arm had been in use for about six years, and during all that time had perfectly answered its purpose. There was no proof showing how long such an arm ought to last or be used. The defendant had a system of inspection which appears to have been all that was practicable. Its inspectors went along the line of telegraph poles and wires,

and carefully looked at them and tried the poles to see if they were still strong and adequate. They were provided with arms so that if they discovered any that were insufficient they could replace them. They were not expected to climb up every pole and examine the arms thereon. Such an inspection would be manifestly impracticable and unnecessary. The linemen all discharge their duties in the daytime. They have frequent occasion to climb the poles and work about the arms, and obviously they are the persons who are expected to see the condition of the arms, and if they find them insufficient to replace them, or to report the fact. It is the obvious duty of every lineman before going upon one of these arms many feet above the earth to inspect it for his own safety.

The intestate had been in the employment of the defendant for several years, part of the time as foreman of the gang of men engaged in inspecting defendant's lines, and part of the time as lineman engaged in the ordinary duties pertaining to that employment. He had all the opportunity which any inspector could have to know the condition of this arm, having frequently inspected that portion of the defendant's line where this arm was. He saw it when he went upon it, and careful inspection was the first thing then suggested to him. He knew that he was in a place of danger, and thus was bound before resting his weight upon the arm to examine it to see if it was sound and probably adequate to support him. He knew precisely how the defendant inspected its poles and the arms on them, and that it was not its custom to cause the arms on the poles to be inspected by some one climbing up the poles, and hence as to him carelessness in not inspecting the arms cannot be attributed to it. He knew that no one knew the condition of the arm which broke better than he did, and no one in fact knew better than he its sufficiency to bear his weight. If he gave the matter a thought, he knew that he must rely upon his own judgment in placing his weight upon the arm; but before placing his weight thereon he ought to inspect it and see if it was sound and

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strong enough to hold him, and that he had no right to rely upon the judgment or inspection of any other person. Under such circumstances it is impossible to perceive how the death of the intestate can be charged to the defendant. *Leary v. B. & A. R. R. Co.*, 139 Mass. 580; *Goodnow v. Walpole Emery Mills*, 146 id. 261. If the intestate was not careless in placing his weight upon that arm, how can it be said that the defendant was careless in permitting him to do so?

Without a more extended notice here of the evidence, giving the plaintiff the benefit of all the facts proved, and all the reasonable inferences from them, we think she failed to sustain the cause of action alleged by her.

The judgment should, therefore, be reversed and a new trial granted, costs to abide event.

FINCH, PECKHAM and MAYNARD, JJ., concur. ANDREWS, GRAY and O'BRIEN, JJ., dissent.

Judgment reversed.

NOTE.— Earlier cases upon the subject of the duty of electrical companies toward their employees may be found in vol. 2 of this series, indexed under title "Injuries from Electrical Apparatus."

In *W. U. Tel. Co. v. Jenkins*, Georgia Supreme Court, March, 1893 (92 Ga. 398), the action was by a widow to recover damages for death of her husband. The complaint alleged that he was a lineman in defendant's employ; that when injured he was removing wires from telegraph poles; that the usual and necessary way to do such work was to climb the poles; that while so engaged, under orders, and in careful discharge of his duties, he was by negligence of the defendant thrown from the pole and fatally injured; that he was not negligent, and that the accident was caused by defendant's negligence in having rotten and insecure poles, the defect having been concealed from and being unknown to him. Held, good on demurrer.

In *Jennie Beardsley v. Minneapolis St. Ry. Co.*, Minnesota Supreme Court, Sept. 7, 1893 (54 Minn. 504), the action was for damages for the death of the motorman on an electric car, who was thrown from the car when it "bucked" and the car ran over him. It was claimed that the bucking of the car was caused by the negligence of the company, which, knowing the defective condition of the car, continued to use it. It appeared that the defect was in the field coils in the rear motor. Held, that there was sufficient evidence to warrant a verdict for the plaintiff.

In *Lorimer v. St. Paul Ry. Co.*, Minnesota Supreme Court (48 Minn.

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891), the plaintiff, while acting as a conductor on the electric railway of the defendant, caught his foot between the irons by which the motor car was coupled to the trailer. The defendant was charged with negligence in providing cars with defective motive power. The "Sprague Motor" was in use, and the particular ground of complaint, as disclosed by the evidence, was that there was no "resistance coil" used in connection with the motor, the purpose of which is to enable a car to be started more gradually than without it. The court submitted to the jury the question whether upon the evidence the defendant was responsible by reason of not providing a resistance coil. Held, that this was error, it not appearing that such device was known at the time in question.

KARL A. CORLIN V. WEST END STREET RAILWAY COMPANY.

Massachusetts Supreme Judicial Court, June 27, 1891.

(154 Mass. 197.)

ELECTRIC STREET RAILWAY.—DUTY TO PASSENGERS.—CONTRIBUTORY NEGLIGENCE.

It is not contributory negligence as matter of law for a passenger to attempt to board an electric street railway car while the car is in motion.

APPEAL by plaintiff from a judgment entered upon the verdict of a jury, under the direction of the court that upon the evidence plaintiff could not recover.

Action to recover for personal injuries sustained by a person who, having signalled an electric street railway car to stop, attempted to board it before it had completely stopped.

G. H. Ryther, for the plaintiff.

M. F. Dickinson, Jr., and *S. Williston*, for the defendant.

KNOWLTON, J.: It was admitted by the defendant, at the argument, that there was evidence on which the jury might have found that the defendant was negligent. The

only ground on which it was contended that the ruling of the court should be sustained was the alleged absence of evidence that the plaintiff was in the exercise of due care. The defendant conceded that the mere fact that the plaintiff was getting on a street car propelled by electricity while it was in motion did not show negligence on his part, but argued that the court should take judicial notice that street cars propelled by electricity often run at a rate of speed which makes it dangerous for passengers to attempt to get upon them, and that the plaintiff failed to show that this car was not so running. It has often been held that the fact that a horse car is in motion does not make it negligent, as matter of law, for a passenger to attempt to get upon it, although we can imagine cases in which, on account of the rate of speed, or for other reasons, it would be negligence in law for a person of ordinary strength and ability to do so. *Meesel v. Lynn & Boston Railroad*, 8 Allen, 234; *Murphy v. Union Railway*, 118 Mass. 228; *McDonough v. Metropolitan Railroad*, 137 Mass. 210; *Briggs v. Union Street Railway*, 148 Mass. 72. There is nothing in the bill of exceptions to show that any different rule should be applied than if the car had been a horse car, moving at the same rate of speed. It is to be inferred that the car was designed for the transportation of passengers from place to place along the public streets, and was to take them up and leave them as requested. There were no platforms or other conveniences for getting on or off along the route, and if there was a rule requiring the car to be stopped to receive and discharge passengers only at designated places, the bill of exceptions does not show it. On the question whether the plaintiff was using due care, such a rule would be immaterial, unless he knew it, or ought to have known it. It is probable that the car could be as easily controlled as a horse car, and we see no reason for applying to it a rule of law which is not applicable to horse cars. The plaintiff described, in a general way, his own conduct, the conduct of the driver, and the motion of

the car just before and at the time of the accident. He did not give in express terms his estimate of the rate of speed at which the car was going. If a jury could properly have found from his testimony that he was acting as men of ordinary prudence are accustomed to act in getting on the car under the circumstances, the ruling of the court was erroneous.

It has been held that the absence of evidence of the particulars of a plaintiff's conduct is not fatal to his recovery where negligence of the defendant is shown, and where it appears in general that the plaintiff was in the line of his duty, in a place where no particular act of precaution was required, and where it does not appear that he was guilty of any act of negligence. In such a case, it may be inferred that he was ordinarily careful. *Maguire v. Fitchburg Railroad*, 146 Mass. 379.

In the present case, the plaintiff testified that, when the car approached him, he signalled to the driver to stop by raising his hand, and that the driver looked straight at him and made a motion with the motor crank; that it seemed to him that the car slackened its speed, and as it was slacking up he put his right hand on the railing to get on, but the car shot forward as he took hold of the railing, and he fell to the ground. Being asked whether the car had stopped when he put out his hand to get on, he answered, "Not to a dead stop." There was some evidence tending to show that the speed of the car was diminished just before the plaintiff attempted to get on, and was then suddenly increased; and we cannot say, as matter of law, that the plaintiff was negligent. We think it was a question for the jury, on all the evidence, whether he was using such care as ordinary persons are accustomed to use under like circumstances. There is much to indicate that the car was going too fast to give the plaintiff an opportunity to get upon it safely, and that he ought not to have tried to get on; but in the opinion of a majority of the court, the question presented by his account of the circum-

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stances is one of fact rather than of law, and it should have been submitted to the jury.

Exceptions sustained.

NOTE.— See note to *Kennedy v. City of Lansing*, post.

JOLIET STREET RAILWAY COMPANY v. MARY DUGGAN.

Illinois Appellate Courts, Dec. 12, 1892.

(45 Ill. App. 450.)

ELECTRIC STREET RAILWAY.— DUTY TO PASSENGERS.— NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

It is contributory negligence as matter of law for a person to attempt to board an electric street car while the car is in motion.

The same rule does not apply where the car was stationary when the person started to board it, but suddenly started before she got on board.

Where a street car has been stopped at a point usual for taking on passengers, the duty devolving upon those in charge of the car of giving ample opportunity for safely mounting, is not limited to the person or persons who may have signalled the car. It is their duty to stop a sufficient time for others desiring to take passage to do so safely. If they do not and the car suddenly starts while one is in the act of getting on and he is thereby injured, the street car company is guilty of negligence.

APPEAL from judgment of Circuit Court, Will county.
Case and facts stated in opinion.

Egbert Phelps, for appellant.

E. Meers, for appellee.

Mr. Justice HARKER: Appellee was injured while attempting to take passage on one of appellant's electric cars. She sued in case, claiming damages on account of the negligence of appellant in suddenly starting the car while she was in the act of getting on, whereby she was violently

thrown to the ground. The case was tried by a jury and a verdict returned for appellee, fixing her damages at \$3,000. A remittitur of \$1,000 was entered, a motion for a new trial overruled, and a judgment rendered for \$2,000 and costs.

It is contended by the appellant that the car was in motion when appellee attempted to mount it; that she was guilty of such gross negligence in holding upon the car while in motion instead of letting loose of it, as she might have done and thereby saved herself injury, as to preclude her from a recovery, and that the proximate cause of her injury was her stepping upon her dress and tripping herself. If she met her injury while attempting to mount a moving car the injury was attributable to her own negligence, and she could not recover for it. Upon this point there was a sharp conflict in the testimony. The car was in charge of a motorman alone. It had stopped to take passengers at a point on Jefferson street (a leading thoroughfare in the city of Joliet), where appellee had frequently taken passage before. It had been signalled by another lady, who entered the car, appellee following closely in the rear. Appellee testified that the car was standing still at the time she attempted to mount it; that just as she had one foot upon the step and her hand on the hand-rail, the car started suddenly, and that she was thereby dragged several feet and thrown to the ground. She is corroborated by two eye witnesses to the injury, Mrs. Conway and Thomas Carlin.. As opposed to these three witnesses, appellant introduced two, who testified that the car was in motion at the time appellee attempted to mount it. The jury were warranted in finding that the car did not start until after appellee had her foot upon the step and her hand on the railing. By continuing her hold upon the car after it started was appellee guilty of such contributory negligence as to preclude her from a recovery? The agitation and excitement which the sudden starting of the car doubtless produced upon the mind of appellee would appear to be sufficient reason for not holding her legally

responsible for contributory negligence. The trying circumstances under which she had been placed by the negligent and wrongful act of appellant precluded that exercise of judgment of which the human mind is capable under less exciting conditions. *Apropos* is the language of Mr. Justice McALLISTER, in *C. & A. R. R. Co. v. Becker*, 76 Ill. 25 : “When the defendant has been guilty of negligence, but seeks to defend on the ground that the party injured might have avoided the injury by the exercise of ordinary care and caution, it sometimes happens in such cases that, as a direct and immediate cause of the defendant’s negligence, the party injured was placed in a position of compulsion and sudden surprise, bereft of independent moral agency and opportunity of reflection. In such a case, it would be against the common judgment of mankind to hold the injured party either morally or legally responsible for contributory negligence.

We are inclined to believe from the evidence that appellee stepped upon her dress after the car started, and that her fall was aided thereby ; but if the jury were correct in finding that the car started after she had partially mounted, it is immaterial whether she stepped on it in an effort to get on the car or while being propelled along the ground by its motor. It is contended that appellant can not be held for negligence because appellee had not signalled the motorman or placed herself in such a position as necessarily to indicate to him that she intended to take passage. The car had been signalled by another lady and stopped for the purpose of taking on that particular passenger—not passengers generally—insists counsel in his argument. The facts appear that although the car had been signalled by but one person, it stopped at a place usual for taking on passengers and appellee was following closely in the rear of the person who did signal. The car was in charge of a motorman alone. It devolved upon him to exercise the same care and caution in allowing passengers opportunity to safely mount and alight, as are required of both conductor and motorman on a car so manned. It was his duty before

starting his car to see whether any person other than the one who had signalled was in the act of taking passage.

Where a street car had been stopped at a point usual for taking on passengers, the duty devolving on those in charge of the car of giving ample opportunity for safety mounting is not limited to the person or persons who may have signalled the car. It is their duty to stop a sufficient time for others desiring to take passage to do so safely. If they do not and the car suddenly starts while one is in the act of getting on and he is thereby injured, the street car company is guilty of negligence.

We do not think the damages are excessive. The court committed no error in modifying appellant's tenth instruction. There was no such defect in the declaration as could be taken advantage of on motion in arrest of judgment. The judgment will be affirmed.

Judgment affirmed.

NOTE.—See note to *Kennedy v. City of Lansing*, post.

**JOHN B. COGSWELL, Respondent, v. WEST STREET AND
NORTH END ELECTRIC RAILWAY COMPANY, Appellant.**

Washington Supreme Court, Oct. 11, 1892.

(5 Wash. 46.)

ELECTRIC STREET RAILWAY.—DUTY TO PASSENGERS.—NEGLIGENCE.

An electric street railway company must expect to be held to a greater degree of responsibility than ever attended the use of the horse car.

In an action to recover for injuries occasioned to a passenger who was riding upon the running board of a car by a plank striking him, the following questions of fact being involved: (1) Did the company place the plank on the track in the position where it struck the plaintiff? (2) Did it inspect its track with reasonable frequency? (3) Did the motor-man keep a sufficient lookout? (4) Was the brake deficient?—it appearing that the company frequently carried more passengers than could be

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seated ; that the accident occurred on a long strip of straight track and down grade, where the motormen were in the habit of letting cars go by gravity ; and that at the time of the accident the car was running from 15 to 20 miles an hour, which the company did not consider an unreasonable rate,—it was not error to instruct the jury that the company was liable to the plaintiff if the injury done him could have been avoided by extraordinary care and vigilance.

It was not contributory negligence for the plaintiff to ride upon the running board, under the circumstances.

APPEAL by defendant below from judgment of Superior Court, King county, for personal injuries. The facts are sufficiently stated in that part of the opinion here printed, or indicated in the head-note.

Burke, Shepard & Woods and *Charles Shepard*, for appellant.

James B. Howe and *J. W. Corson*, for respondent.

The opinion of the court was delivered by STILKS, J.:

* * * * *

4. Running through the charge as given, the court instructed the jury, in substance, that the appellant, as a common carrier of passengers, was liable to the respondent if the injury done to him could have been avoided by extraordinary care and vigilance on the part of the appellant, its agents and employes. Substantially, the instructions on this point were the same as those usually given in cases of injuries upon steam railroads. It has long been the rule that when carriers undertake to convey persons by the powerful and dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. *Philadelphia, etc. R. R. Co. v. Derby*, 14 How. 486 ; *Steamboat New World v. King*, 16 How. 469 ; *Pennsylvania Co. v. Roy*, 102 U. S. 451. But the appellant maintains that it should not be placed within the category of steam railroad cases, but should be held only to the lesser degree of care required of horse railroad companies. It was said in *Unger v. Forty-second St. etc. R.*

R. Co. 51 N. Y. 497, that the same degree of care and skill was not required of carriers of passengers by stage coaches as was required of steam railroad companies, and that for the same reason it was not required of carriers of passengers upon street cars drawn by horses. Probably the correct rule in all such cases, whether the method of transportation be steam, electricity, compressed air, horses, or any other power, is as well stated in that case as anywhere, viz., that the degree of care required in any case must have reference to the subject matter, and must be such as a man of ordinary prudence and capacity may be expected to exercise in the same circumstances. In some cases this rule will require the highest degree of care, and in others much less.

There were four questions of fact involved in this case: (1) Did the appellant deposit the plank on the track in the position where it struck the respondent? (2) Did it inspect its track with reasonable frequency? (3) Did the motorman keep a sufficient lookout? (4) Was the brake deficient? In any one of these matters it was certainly not improper to say to the jury that the railroad company should exercise at least a very high degree of care, since it appears that it was at this time frequently carrying over this track such numbers of passengers in open cars that they could not be supplied with seats; that the track was straight for a long distance, and on a down grade; that it was the custom of the motormen to allow the car to run down the grade by gravity, leaving it dependent for stoppage almost entirely upon the brake, and that it was not considered by the company unreasonable for the car to run along the place in question at a rate of from fifteen to twenty miles an hour. The lowest estimate of the rate of speed of this car made by any witness was of the motorman, who put it at about sixteen miles an hour. Other witnesses think it was running at twenty-five miles an hour. If there are any circumstances where a carrier of this kind should be required to keep its track clear, its

motorman's eyes open, and its brakes in perfect order, they are certainly presented in this case.

Since the decisions which fixed the liabilities of horse railroads were made, and within very recent years, electricity as a motive power for propelling street cars has come into general use, and but few cases are to be found in the books relating to them. A horse car is very little different from a stage coach, or any other wheeled vehicle drawn by horses, but an electric car differs from a horse car in many respects as greatly as does a steam car. In the course of judicial treatment the operators of such vehicles must expect to be held to a greater degree of responsibility than ever attended the use of the now almost obsolete horse car.

* * * * *

8. Respondent could find no other place to locate himself on the car but the footboard running along the side of the car, because the car, which was an open one with seats running crosswise, was full, as was all the standing room on the platforms and on both the footboards. No objection was made by any agent of the appellant to his taking that position, and it was shown to be a common thing for passengers on appellant's cars to ride in that way. There might be some injuries to which such action on the part of a passenger would be justly said to contribute, but they are not of the class of injuries here in question.

* * * * *

ANDERS, C. J., and HOYT, J., concur.

SCOTT, J., reads for affirmance of judgment.

DUNBAR, J., writes dissenting opinion.

NOTE.—See note to *Kennedy v. City of Lansing*, post.

THE CITIZENS' STREET RAILWAY COMPANY V. SPAHR.*Indiana Appellate Court, Feb. 28, 1893.*

(7 Ind. App. 23.)

ELECTRIC STREET RAILWAY.—DUTY TO PASSENGERS.—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

A complaint in an action for damages for personal injuries, which contains the allegations that the defendant owned and operated an electric street railway; that it was in the habit of requiring passengers to board its cars while in motion; that plaintiff hailed the car as it approached a street crossing; that the car slowed up, as plaintiff believed and had a right to believe, for the purpose of allowing him to board it; that while attempting to board it he was thrown to the ground and injured by the car being suddenly and negligently started up: that he was not notified that he could not ride on the car, and that he was free from negligence, states a cause of action sufficiently, at least, to meet a motion to dismiss after verdict rendered.

In such an action no different rule of diligence for the protection of the traveling public applies to an electric street railway company than to one operating a horse railway.

It is not contributory negligence as matter of law to attempt to board a moving electric street car.

FROM the Marion Supreme Court.

H. C. Allen, for appellant.

W. P. Fishback, *W. P. Kappes*, and *H. Dailey*, for appellee.

GAVIN, J.: The complaint, so far as it is material to be stated, alleges, in substance, that appellant was owning and operating an electric street car line over the streets of Indianapolis; that it so conducted its said business as to require those using its cars to get on and off while the cars were in motion; that on the 3rd day of November,

1891, while appellee was waiting to take a car at a street crossing, which was a usual and proper place to enter its cars, a motor car, with trailer attached, in charge of appellant's servants, approached the crossing, and as it approached, the appellee "notified those in charge thereof that he desired to get on said car and ride down town;" that as the cars neared the crossing they slowed up, for the purpose, as appellee thought, and had a right to believe, of allowing plaintiff and others who were waiting, to get on the cars, and as the trailer came opposite to him, appellee started to get on the same, and would have got on easily had it not been for defendant's conduct as hereinafter set forth; that to get on the car appellee took hold of the handle, and just then, and before he got on, or had time to get on the car, defendant negligently, suddenly, and with a violent, quick jerk, greatly increased the speed of said car without any notice or warning to him, and he was thereby jerked from his feet and thrown to the ground, and severely injured, without any fault or negligence on his part contributing thereto; that he was not notified he could not ride on said cars. Whereby he was damaged, etc.

The sufficiency of the pleading was not questioned until after verdict, and for that reason the same degree of strictness is not to be applied to it as would be required had it been tested by demurrer. *Harris v. State, ex rel.*, 123 Ind. 272; *Laverty v. State, ex rel.*, 109 Ind. 217; Elliott's App. Proced., section 473.

The sufficiency is questioned here on the ground that it fails to show:

1st. Any invitation, express or implied, from appellant to appellee to become a passenger.

2nd. Knowledge by appellant's agents of appellee's intention to attempt to board the car.

3rd. Facts from which appellant's servants might reasonably have known of this intention.

4th. Freedom from negligence on the part of appellee.

Except as to the motive power being electricity instead

of horses, the facts as found in the case of *Conner v. Citizens Street Railway Co.*, 105 Ind. 62, are substantially similar to these in all essential features, and the objections of counsel are largely met by the language of the opinion in that case: "Being at the usual place where passengers were taken up, and having given notice to the person in charge of the car that he desired to be taken up, it was the plain duty of the driver, or person in charge, either to afford him reasonable opportunity to enter the car, or to notify the plaintiff, either by continuing the rapid pace, or in some other way, that he would not be taken. Instead of giving any sign that he would not be taken, the speed of the car was slackened, so that it was moving slowly when he attempted to get on. Having received the signal and slowed up in a manner to invite the plaintiff to get on, it was a clear act of negligence in the driver, or person in charge, not to observe the plaintiff, if he did not observe him, and, while he was getting on the car, in a manner in which the defendant usually received such passengers, to cause the car to be 'jerked' forward, as the jury found."

Appellant insists that the facts show that the appellee was negligent, because the car was in motion when he boarded it, and it does not appear how slow it was going, nor, in so many words, that it was safe to make the attempt. Without discussing what might be the effect of the lack of such allegations in the absence of the general averment of want of negligence upon the part of the appellee, it is sufficient to say that there is nothing in the facts alleged which would overthrow the express allegation of want of negligence.

"It has, however, long been the rule in this court, that unless the facts specifically stated clearly show that there was contributory negligence, the general averment will rescue the complaint from its assailant." *Evansville, etc., R. R. Co. v. Crist*, 116 Ind. 446; *Cincinnati, etc., R. W. Co. v. Darling*, 130 Ind. 376.

Counsel seeks to control the case in hand by the rules applicable to dealings with ordinary railway trains.

It was held, in the *Conner case, supra*, that the rules applicable to boarding steam railway trains do not apply in all their vigor to getting on street cars while in motion, and this position is abundantly supported by authority. Beach on Cont. Neg., sections 290 and 291; Patterson's Railway Acc. Law, p. 290; Booth on Street Railway Law, section 336.

It is urged that here a different rule governs, because the motive power is different, being electricity instead of horse power. No authority is cited to sustain the distinction, nor are we able to see any ground for any material difference in the rules of law to be applied, since the objects and general methods and purposes of the street railway remain the same, whatever be the motive power.

In *Chicago City R. R. Co. v. Robinson* (Ill.), 36 Am. and Eng. R. R. cases, 66, the court, in considering a question of negligence in a footman's failing to look, held that the same rule (more liberal than in the case of railway trains) governed, whether the cars were horse cars or cable cars.

In *Highland Ave. etc., R. R. Co. v. Burt*, 92 Ala. 291, it is decided that the rules and conditions governing street cars run by a dummy engine are not those which govern ordinary railway trains.

In *Corlin v. West-End Street R. W. Co.*, 27 N. E. Rep. (Mass.), 1,000, this very question comes up as to electric cars, and the court said: "We see no reason for applying to it (the electric street car) a rule of law which is not applicable to horse cars.

The complaint, we think, is therefore good after verdict at least, and this is all we are called upon to determine.

Several causes of error are presented under the motion for a new trial.

* * * * *

It is earnestly contended that the court erred in refusing to charge the jury, as requested by appellant, that "if you find from the evidence that the plaintiff attempted to get on

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defendant's car at the time of the alleged injury while the car was moving at the rate of eight miles an hour or more, the plaintiff was thereby guilty of negligence, and your verdict should be for the defendant."

This instruction is based upon the assumption that it was the duty of the court to declare, as a matter of law, that the act of appellee was, in itself, by reason of the cars moving at this rate, such negligence as forbade a recovery.

In *Evans v. Adams Express Co.*, 122 Ind. 362 (365), relied upon to sustain this position, this rule is declared: "When the facts assumed present a case in which the standard of duty is fixed and certain, or where the measure of duty as defined by law is the same under all circumstances, to omit the duty is negligence, and may be so declared by the court; or where, upon a given hypothesis, negligence is so clearly defined and palpable as to constitute negligence under all circumstances, it is the duty of the court to declare that if the facts assumed are formed from the evidence, the conclusion of negligence follows as matter of law."

In the *City of Franklin v. Harter*, 127 Ind. 448, the Supreme Court stated the rule quite fully, and we quote from it: "As the question in cases where a municipal corporation is sought to be held liable for injuries caused by a defect in a street is one of negligence, it is seldom that the court can determine the question as one of law, for in by far the greater number of cases the question is a complex one, in which matters of law blend with matters of fact. In all such cases the duty of the court is to instruct the jury as to the law, and that of the jury to determine whether, under the law as declared by the court, there is actually negligence. Nor does this general rule fail in all cases where the facts are undisputed, since the rule has long been settled in this State that where an inference of negligence may or may not be reasonably drawn from admitted facts, the case is ordinarily for the jury under proper instructions; but where only one inference can be reasonably drawn from the facts, the question of negligence or no negligence may

be determined by the court, as one of pure law. The rule, as we have outlined it, is the law of this State and must be so accepted, notwithstanding expressions occasionally found in some of the cases which seem to indicate a different doctrine. It would overthrow a long line of cases to deny the rule, and it would also lead to the subversion of sound and salutary principles. In the old as well as in the recent cases the doctrine we here declare has been strongly and explicitly asserted, and to that doctrine we give an unwavering and unhesitating adherence, disapproving all statements which seem to deny its soundness."

This doctrine, that while there is a class of cases in which the court will adjudge negligence as a matter of law, there is another class where the question is to be submitted to the jury, under proper instructions, is sustained by *Baltimore, etc. R. R. Co. v. Walborn, Admr.*, 127 Ind. 142, where there is an elaborate opinion, with abundant authorities by COFFEY, J., and also by *Rogers v. Leyden*, 127 Ind. 50; *Mann v. Belt R. R. Co.*, 128 Ind. 138; *Shover v. Pennsylvania Co.*, 130 Ind. 170; *Cleveland, etc. R. W. Co. v. Harrington*, 30 N. E. Rep. 37 (131 Ind. 426); *Farrell v. Waterbury Horse R. Co.*, 46 Am. and Eng. R. R. Cases (Conn.), 207.

Thus it is apparent that the court cannot determine, as a matter of law, that it is negligence to board a street car moving at the rate of eight miles an hour, unless there be some definite or fixed standard by which this act can be measured, or unless this act is such an one as that it reasonably permits but the one conclusion of negligence.

We know of no fixed or definite standard by which we may determine the exact rate at which street cars may be safely boarded. *Cleveland, etc. R. W. Co. v. Harrington, supra.*

None of the cases to which we have been cited by counsel support the proposition that it is negligence *per se* to board a moving street car, while the opposite doctrine is asserted by numerous authorities.

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“It is not necessarily contributory negligence to * * get on or off a moving car (street car).” Patterson’s Railway Acc. Law, p. 291.

“It is well settled that it is not contributory negligence *in se* for one to alight from or board a moving street car.” Beach on Cont. Neg., section 291.

“Whether a party jumping or stepping from a moving car is guilty of negligence must, it is manifest, depend upon other circumstances than the speed of the cars, and these circumstances are so variant that general rules only can be stated.” *Weber v. Kansas City Cable R. W. Co.*, 100 Mo. 194; *Vide*, also, *McDonough v. Metropolitan R. R. Co.*, 137 Mass. 210; *Briggs v. Union Street R. W. Co.*, 148 Mass. 72; *Rathbone v. Union R. R. Co.*, 13 R. I. 709; *Corlin v. West End St. R. W. Co.*, *supra*.

This last case is an electric railway case, and very similar to the case at bar in its details.

In this case there is evidence tending to prove that it was the custom of appellant’s servants to require men to board their cars while in motion; that appellee gave to the men in charge notice of his desire to get on; that the speed of the car was slackened to one-half or one-third its previous speed, as fixed by some witnesses; that just before appellee started to get on, the car appeared to be going only four miles an hour; that the employes saw appellee, and had reason to know he intended to get on; that he thought the car was slackened to permit him to get on, and that he would have succeeded, had it not been for the misconduct of appellant in giving the sudden jerk to the car.

Without enumerating the evidence further, it seems to us that, with these facts existing in the case, this court can not say, as a matter of law merely, from the speed of the car, that appellant’s act was necessarily negligence which contributed to his injury. The question of negligence was, therefore, properly left to the jury, to be by it determined not upon one fact alone, but under all the facts and circumstances of the case.

While there is in the evidence the sharpest conflict upon the material points, there is evidence to sustain all the material allegations of the complaint.

The judgment is affirmed.

Petition for a re-hearing overruled June 20, 1893.

NOTE.—See note to *Kennedy v. City of Lansing*, post.

**ANNIE SEARS AND FRANK SEARS, Respondents, v. SEATTLE
CONSOLIDATED STREET RAILWAY COMPANY, Appellant.**

Washington Supreme Court, April 17, 1893.

(6 Wash. 227.)

ELECTRIC STREET RAILWAY.—DUTY TO PASSENGERS.—NEGLIGENCE.

In an action for damages for injury to a passenger upon an electric street railway, caused by the car running into a wagon, a witness, having testified to what he saw as to the speed of the car, the position of the wagon and the acts of the motorman and the driver of the wagon, was properly permitted to testify that the motorman could not stop the car before he did because "he was running at too high a speed to stop it in that distance." In such an action the negligence of the driver of the wagon constitutes no defense.

If a motorman sees that the driver of a wagon in front of him does not look back, nor pay any attention to the ringing of the bell, nor increase his rate of speed, nor attempt to leave the track, it is his duty to bring his car under control, and even to stop, if necessary, to avoid a collision. For failure to perform such duty, the jury rightly found the railway company liable for the damages sustained by a passenger.

APPEAL by defendant from judgment of Superior Court, King county, entered upon a verdict in favor of plaintiff in an action to recover for personal injuries. Facts stated in opinion.

Wiley, Scott & Bostwick, for appellant.

Thompson, Edsen & Humphries, for respondents.

Sears v. Railway Co.

The opinion of the court was delivered by ANDERS, J. The appellant owns and operates lines of street railways in the city of Seattle, one of which has its terminus at Fremont, a suburban village some distance from the main portion of the city, and situated at the north end of Lake Union. It is known as the Fremont line, and connects with another line of street railway which extends to Green Lake, in the northern portion of the city. On September 16, 1891, the respondent, Annie Sears, entered upon one of the cars of the appellant to go to Green Lake. The motive power used upon the said railway is electricity, and the car upon which the respondent became a passenger at the time above mentioned was what is called an "open car." Before reaching Fremont, and while the car upon which Mrs. Sears was riding was going down a grade on Roland street, it collided with a wagon which was upon appellant's track and going in the same direction, ran off the track, and turned to the left, and ran across the street to the verge of an embankment, which was sixteen feet from the left, or west, rail of the railway track. The respondent was seated on the right hand side of the car, and when she saw that the car was leaving the track she became frightened and rose up from her seat and took hold of the post supporting the roof of the car with her right hand to steady herself, and endeavored to jump from the car. In so doing she struck upon her feet, but was thrown upon her back close to the left hand side of the track, and thereby received serious injury. Nearly all of the other passengers leaped from the car at about the same time, but neither they nor the one or two persons who remained in the car were in any wise injured. The respondents, who are husband and wife, instituted this action to recover damages for the injury so received by said Annie Sears, and alleged in their complaint that said injury was caused by the negligence of the servants and employes of appellant in the management of its car. The defendant, in its answer, denied that the alleged injury was caused by any negligence or carelessness on its part, and affirmatively alleged that if the said Annie Sears

sustained the injury mentioned in the complaint, it was caused wholly by her own carelessness and negligence. There was a verdict and judgment for plaintiffs, and the defendant brings the case here for review.

The first error assigned by the appellant is, that the trial court, over the objection of appellant, wrongfully permitted a witness for plaintiffs, Mr. Eck, to answer the question, "What was there, if anything, to prevent him (the motorman) stopping the car and applying the brakes a long time before he did?" The witness answered, "He was running at too high speed to stop it in that distance."

The learned counsel for the appellant insists that this was, in effect, permitting the witness to give his opinion to the jury upon the question, whether or not the defendant was negligent in the management of its car. The witness had already testified that the car was running at the rate of about twelve miles an hour; that the wagon on the track was in plain view for a distance of four hundred feet; that the motorman commenced ringing the bell as a warning of his approach at or about that distance from the wagon, and rang it continuously thereafter; that the man in the wagon made no attempt to get off the track until the car was pretty close to him, and when the motorman found that the wagon was not going to get out of the way in time, he made every effort possible to stop the car, but that he was then within a hundred feet or more of the wagon. Under these circumstances we think it was not error to overrule the objection to the question, even upon the theory of the appellant, that the testimony given in response thereto was the expression of the opinion of the witness, and not the statement of a fact within his own knowledge.

It is a general rule of evidence that witnesses may not give opinions as to matters of fact which the court or jury are ultimately to determine. But this rule is not without exception. And the exception is not confined to the evidence of experts who may give opinions upon questions requiring special skill, knowledge or learning, but includes the evidence of common observers, who may state the results of

their observations in regard to ordinary appearances and conditions of things which cannot be produced to a jury exactly as they were observed by the witness at the time. Non-expert witnesses who have had opportunities to observe, and who have actually observed the demeanor, actions and appearance of a particular individual, are competent to express an opinion upon the question whether such person was sane or insane. And every person of ordinary understanding and intelligence is competent to give an opinion as to the identity of persons or things; as to whether another appeared to be sick or suffering from pain; as to the direction from which a blow was delivered which produced a wound upon the person of another. *People v. Hopt*, 4 Utah, 247 (9 Pac. Rep. 407).

Of course, the weight of such testimony depends upon the thoroughness of the observation of the witness; and whether he has sufficiently observed and considered the particular fact or matter under consideration to enable him to form an opinion in respect thereto, is a question which, if raised, is to be determined by the court, by the application of the same rule which governs in ascertaining the qualifications of experts. In *People v. Hopt*, *supra*, this question is very elaborately and satisfactorily discussed, and many cases cited showing particular instances in which non-experts have been allowed to express opinions. And the Supreme Court of Utah, in delivering the opinion in that case, said:

“The admissibility of the evidence rests upon three necessary conditions: (1) That the witness detail to the jury, so far as he is able, the facts and circumstances upon which his opinion is based, in order that the jury may have some basis by which to judge of the value of the opinion; (2) that the subject matter to which the testimony relates cannot be reproduced and described to the jury precisely as it appeared to the witness at the time; and (3) that the facts upon which the witness is called upon to express his opinion are such as men in general are capable of comprehending and understanding.

We think the rule there laid down is clearly deducible from the authorities, and that, tested by it, there was no error in the ruling of the court upon the point in question. The witness in this case expressed his opinion as a conclusion of fact based upon the observation made by him, at the time of the accident, as to the rate of speed of the car and the exertions made by the motorman to stop it; and it seems to us that the testimony is clearly embraced within the rule above stated.

* * * * *

In our opinion, the court properly refused to give to the jury instructions Nos. 6 and 7, requested by the appellant. They were predicated upon the idea that because the man in charge of the wagon failed to drive off the track, as he should have done, and as the motorman expected, in time to avoid a collision, and was thus in some measure to blame for the accident, the appellant should not be held responsible. No doubt the instructions requested would have been proper in an action against the appellant by the driver of the wagon for damages to him caused by the collision. But, in this case, the respondents had no control over the driver of the wagon, and no contractual relation whatever existed between them and him, and they were in no way responsible for his actions.

"It is no defense for a negligent carrier, as against his passenger, that the negligence or trespass of a third party contributed to the injury, although the latter acted independently of the carrier." 2 Shear. & R., Neg. (4th ed.), § 502; *Eaton v. Boston, etc. R. R. Co.*, 11 Allen, 500; *Carpenter v. Boston, etc. R. R. Co.*, 97 N. Y. 494; *Little v. Hackett*, 116 U. S. 366 (6 Sup. Ct. Rep. 391).

The questions for the jury to determine were, was the appellant guilty of negligence in the management of its car, and, if so, was the injury sustained by the respondent, Mrs. Sears, solely the result of such negligence? The jury answered these questions in the affirmative, and a careful examination of the evidence convinces us that they arrived at a correct conclusion. No reason is given

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for not stopping the car before it came in contact with the wagon, except that the man in charge thought that the wagon would be removed from the track before he reached it. And yet this same man testified that the man in charge of the wagon made no attempt to leave the track until the car was so near him that a collision could not be avoided by putting on the brakes or reversing the motion of the wheels of the car. It seems plain to us that when the motorman saw that the person on the wagon neither looked back nor paid any attention to the ringing of the bell, nor increased his rate of speed, nor attempted to leave the track, it was his duty to bring his car under control, and even to stop, if necessary, to avoid a collision. 2 Shear. & R., Neg., § 483. By the exercise of reasonable care and diligence on the part of appellant's employe, the injury might have been avoided, and, by failing to exercise such care and diligence, he failed to discharge his duty to the respondent, Mrs. Sears, as a passenger. The wagon was seen by him at a distance of at least four hundred feet, and no valid reason is shown why the car could not have been stopped within half that distance, and the motorman himself says he would have stopped if he had known the wagon was going to remain on the track.

* * * * *

The judgment of the court below is affirmed.

DUNBAR, C. J., and SCOTT, J., concur.

STILES, J., writes a dissenting opinion, in which HORT, J., concurs.

NOTE.— See note to *Kennedy v. City of Lansing*, post.

CENTRAL PASSENGER RAILWAY COMPANY V. ROSE.*Kentucky Court of Appeals, June 1, 1893.*

(32 S. W. R. 745.)

**ELECTRIC STREET RAILWAY.—DUTY TO PASSENGERS.—NEGLIGENCE.—
CONTRIBUTORY NEGLIGENCE.**

For the persons in charge of an electric street car to slow up at a crossing in obedience to the signal of an intending passenger; to suddenly turn on the current and start the car at a rapid speed while the passenger is in the act of boarding the car; and seeing his peril to make no effort to stop the car at once, is gross negligence.

It is not contributory negligence as matter of law to attempt to board a slowly moving electric car.

APPEAL by defendant below from judgment rendered in Court of Common Pleas, Jefferson county, in an action for injuries caused by negligent and wrongful management of an electric car. Facts stated in opinion.

Humphrey & Davie, for appellant.

J. W. Chatterson for appellee.

HAZELRIGG, J.: The appellee, Rose, was a stair builder in Louisville, and on the evening of the 3rd of June, 1890, came to a point near the crossing at Jackson and Green streets, as had been his custom for some eight or ten months, for the purpose of boarding appellant's street car, *en route* home. As the car approached, he signalled the motorman, who "slowed up," and then, while the car was running as slowly as was its custom under such circumstances, he got hold of the rail, and started to step up on the platform, when the electric current was suddenly turned on, and the car started with a jerk at a fast rate of speed, throwing him

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off his feet, and dragging him some 50 feet or more, when he fell, and was struck by the car steps and badly injured. The conductor and motorman saw his peril, and made no effort to stop the car until after he fell. This is the stated case shown by the proof of the appellee.

The appellant shows that on the evening in question the car was behind time, and was running as a "through train." It was not stopping to take on passengers. It "slowed up" at the crossings because of possible collision with passing vehicles. When going pretty rapidly, near the crossing in question, the appellee ran out, and grabbed the rear end of the motor car. The force of the car threw him down, and dragged him "a foot or two, or may be three," upon which the car was stopped, within a space of seven or eight feet; the conductor testifying: "When I saw him [appellee] make a rush for the car, I grabbed the brake with one hand and the bell cord with the other. * * * I put on the brake when he made a rush for the car, about the time he grabbed the car." The motorman says: "After I slowed up the car at the first crossing, and saw everything was clear, I threw the current on, and went ahead. After I passed the last crossing, some gentleman, I don't know who it was, stepped off the sidewalk and threw up his hand. I shook my head—I didn't have time to do anything else—that I would not stop. He started for the car anyhow, like he was going to grab it, and I shut the current off, and looked back this way to see what had become of him. The car was just rolling, and I saw Rose raise up, and I reversed the car, and stopped it in about six feet.

Manifestly, if the facts are as stated by the appellee, the company's employes were guilty of the grossest negligence. It might well have been concluded by the jury that they had shown an utter indifference to Rose's safety after seeing his peril; that in their determination not to stop for passengers, but reach their destination on time, they had recklessly disregarded their plain duty in not stopping the car in the shortest time possible upon seeing the danger. Upon the state of case shown by the appellant's witnesses,

there was no negligence on the part of the company's servants, but the injury was the direct result of the appellee's own negligence. The jury heard the proof, were the judges of it, and, if they were properly instructed, the judgment must be affirmed. We cannot say, as matter of law, that it was contributory negligence on the part of the appellee to undertake to board a slowly-moving electric car. The rate of speed at which it was going on the occasion in question, the manner of the attempt to board it by the appellee, and the conduct of the crew in charge of the car, after the peril was discovered, were matters put in proof before the jury. Their province was to determine from the proof what state of case actually existed, and what acts were or were not negligent acts under all the proof and the instructions. They evidently believed the appellee and his witnesses. We cannot disturb their finding, as there is sufficient testimony to support it.

The first instruction given to the jury is that, if they believe from the evidence that the plaintiff was injured by the negligence of the defendant or its agents, they shall find for the plaintiff, unless they believe that the plaintiff by his own negligence contributed to the injury, in which case they shall find for the defendant; but if they further believe that after the plaintiff was in a position of peril, which was known to the defendant, the said defendant or its agents could have then, by the exercise of ordinary care, avoided the injury to the plaintiff, then the law is for the plaintiff, notwithstanding any previous conduct of his may have contributed to place him in such position of peril or danger. Substantially correct definitions of negligence and gross negligence were submitted to the jury, and if gross negligence was established, they were told to find exemplary damages or not, in their discretion. Their verdict was for \$2,500, which was not more than fair compensatory damages. We are of opinion that the law was properly given, and fully as favorable to the appellant as was authorized.

The appellant insists that it was the duty of the plaintiff

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sible for the safety of the place as one for getting off, whether the car, at the time the passenger undertakes to do so, be in motion or at rest, the conductor not seeing the passenger, or being aware of his purpose, at the time the attempt to get off is made.

* * * * *

APPEAL by defendant below from judgment of City Court of Richmond, awarding damages to plaintiff for death of her son.

The following extracts from the official report state so much of the case as seems to be of general interest :

“On January 13, 1891, Mrs. Glover sued the railway company for damages for the killing of her son, John C. Glover, who was alleged to have been 15 years and 5 months old. The declaration alleged that he was single, and had no child or children ; that she was dependent on him, and that he contributed to her support ; that he boarded one of defendant's street cars, propelled by electricity, in Augusta, for the purpose of going to the Georgia railroad depot, took his seat, and paid his fare ; that when the car reached a certain point, about opposite the Union depot, it came to a stop, and he got off the car from the rear platform, near to the parallel street railroad track of the defendant, at which moment another of defendant's cars, running on the parallel track in an opposite direction to that of the car from which he had just dismounted, ran over him, killing him ; that he was not familiar with the method in which the cars were run and operated ; that he resided in the country and had never before ridden on said electric cars ; that the approach of the car which ran over him was wholly unexpected and unseen by him until too late to get out of the way ; that it was the duty of defendant's agents in charge of the car on which he had ridden to the depot, to have had closed the platform gate next to the parallel track on the rear end of the car and to have cautioned and seen that he did not leave the car from that side, which duties they negligently and carelessly failed to perform ; that it was also the duty of defendant's agents in charge of the car which ran over him to have slowed up as it approached

the point where it was to pass the other car, which duty was wholly disregarded, the car being actually run at the time at the rate of 12 miles per hour, a rate not only positively prohibited by the city ordinances, but which, in the absence of such prohibition, would at the locality have been an act of gross carelessness; that the motorman in charge of the car that ran over her son, at the moment or just before, was negligently engaged in a conversation with the conductor instead of being on the lookout ahead of his car, as was his duty."

The defendant demurred to the declaration of the mother. The demurrer was overruled.

* * * * *

The defendant's allegations of error upon the trial are sufficiently indicated in the opinion.

J. S. & W. T. Davison, for plaintiff in error.

Twiggs & Verdery, J. C. C. Black and J. T. Pendleton,
contra.

BLECKLEY, Chief Justice: 1. The material contents of the declaration are stated in the official report. A legal cause of action under the act of 1887 was set forth. It was not necessary to allege that the deceased could not have seen the car approaching him in time to avoid coming in collision with it, or that he made any effort to avoid coming in collision with it. It was not necessary to allege that the point at which he left the car was a regular stopping place, or that the stopping of the car was for the purpose of taking on or letting off passengers. It was not necessary to allege that he gave any notice of his desire or intention to leave the car, or that defendant's servants had notice of such intention. It was not necessary to allege that the company had notice of his want of familiarity with the running and operation of electric cars, or anything as to his size or appearance.

* * * * *

7. Evidence that the son had no previous experience in traveling upon an electric car was admissible, not for the purpose of changing or affecting the measure of the company's diligence, but as a fact tending to illustrate the cause of his failure to alight in safety. The jury, in looking at the facts and circumstances of the homicide, would naturally desire to classify the particular passenger, not alone by his age, but also by his experience or the want of it in handling himself on electric cars. Familiarity with this mode of transportation would qualify him to see and appreciate danger which he would not be likely to observe if he was wholly without experience. With experience he might be chargeable with fault; without it, with none. And hence in the one case his failure to come off safely might be attributable to his own negligence, in part or in whole; whereas, in the other case, he might be treated as free from any negligence whatever. It may be that the evidence might have other bearings, but it has this at least.

8. The negligence charged as to gates was in not having the gate of this particular car closed on the side next to the parallel track. We think what the president of the company would have testified as to his observations on other double track lines of street cars in various cities was not relevant, and was consequently properly rejected. Two reasons against the admissibility of this evidence occur to us. The first is, that the practice of other lines would not serve for comparison on the question of diligence unless it was shown that these lines were properly equipped and managed, or were so recognized and reputed to be by experts in the business; the other is that it was not stated whether the other lines had gates to their cars or not, but only that gates were not used. There is no recital in the record of what was proposed to be proved by the president, except what is quoted, in the eighth head note, from the motion for a new trial. If the lines examined by the president were without gates to the cars, their practice in not

using gates would throw no light on the diligence of a company which, like the defendant, has provided gates, but omits to use them.

9. There may be no negligence whatever in failing to have gates, for the very highest order of equipment is sufficient to come up to the standard of extraordinary diligence. This standard may be reached short of the very best, or the superlative of the attainable. But, when a company has provided gates, due diligence might require it to use them, and failure to use them might be negligence in the given instance. Whether it would be or not is a question of fact for the jury. There was no error in so treating it. And this is so, irrespective of the particular object which the company had in view in procuring the gates, or of its own practice in their use. A hackman might put brakes on his hack for use in descending mountains only, and might restrict the use by his own practice to the making of such descents; but, having them upon his vehicle, it might be negligence not to use them on proper occasions in descending ordinary hills as well as mountains. Extraordinary diligence may require the carrier to use what he has though it would not require him to have as much as he has provided.

10. The charge of the court that "carriers of passengers are required to provide at points of destination places where passengers can leave their cars safely," was somewhat misleading, as applied to a street railway. Companies engaged in carrying passengers on cars along a public street are not understood as engaging to make safe landing places, but to select them. The duty is to select such place with reference to getting off whilst the car is at rest. The company is not responsible for peril which the passenger incurs without its fault, in attempting to alight after the stoppage has terminated, and the car has again been put in motion, provided a reasonable time for alighting was allowed while it was at rest. This is true, more especially if the conductor did not know that the particular passen-

ger intended to get off at that place, and did not see him attempting to get off in time to warn or prevent him from so doing whilst the car was in motion. The charge that "a carrier of passengers is legally bound not only to safely transport, but to furnish the means of safe egress from the trains and passage therefrom," was not applicable to the facts. There was no question about furnishing the means of safe egress, but the complaint was that the passenger was permitted to use unsafe means, and in so doing was carelessly injured by another car.

11. Of course no duty touching the selection of a safe place for landing passengers is operative on any stop made on account of an obstruction upon the track. When a stop is made for that reason, and there is broad daylight by which passengers can see for themselves, if one of them undertakes to get off, whether the car be in motion or at rest, the conductor not seeing him, or being aware of his purpose, he cannot complain that a safe place was not selected for him to alight. This, however, would not justify the company in negligently running over him, if, by accident, he failed to gain a firm footing on alighting, but fell on a parallel track, exposing himself to danger on that track.

* * * * *

What may be contained in the motion for a new trial, which we pass over in silence, we deem free from substantial error. This includes the many requests to charge the jury which were denied, and some other topics besides. If the plaintiff's son had, before he was injured, succeeded in getting a footing upon the street, which he could have maintained, his relation as passenger would then have ceased. But we understand the evidence as warranting the conclusion that he failed to effect a landing upon the street, and fell upon the parallel track as the result of his attempt to land, and not as a sequence to a landing already accomplished. In *Creamer v. Railroad Co.*, 156 Mass. 320 (52 Am. & Eng.

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R. Cases, 558), the passenger had safely landed, and when struck by the car was walking on the street.

* * * * *

Judgment reversed.

NOTE.—See note to *Kennedy v. City of Lansing*, post.

PFEFFER V. THE BUFFALO RAILWAY COMPANY.

Superior Court of Buffalo, N. Y., General Term, July, 1893.

(4 Misc. 465.)

ELECTRIC STREET RAILWAY.—DUTY TO PASSENGERS.—NEGLIGENCE.

The same rule which applies to steam cars and to horse cars, applies also to cars propelled by electricity, viz., that where passengers are going upon or alighting from cars, to suddenly start them without giving warning, is an act of negligence.

It is not negligence *per se* to attempt to board a stationary electric car by the front platform.

Under the circumstances of a given case, held that the questions of negligence and contributory negligence, in a case where injuries were received by a person about to board an electric car at a crosswalk where cars were wont to stop and where the car in question was stationary, were proper for the jury.

APPEAL by defendant from judgment entered upon a verdict and from an order denying defendant's motion for a new trial, made upon the minutes of the court. Facts stated in opinion.

C. S. Crosser (*Clarence M. Bushnell*, of counsel), for defendant (appellant).

E. T. Durand (*Geo. W. Cothran*, of counsel) for plaintiff (respondent).

HATCH, J.: There is discovered in the record conflicting testimony, but not more so than is usually present in negligence cases, nor is it so serious in conflict as many cases of this character present. Taking the undisputed matters and the finding of the jury, the following facts must be deemed established: On Sunday morning, about nine o'clock, of August 30, 1891, plaintiff arrived at the corner of Balcom street and Harvard place, for the purpose of taking a Harvard place car to be transported thereon to Buffalo Park, where he was employed by a sewer contractor to watch tools. Near Harvard place are situated defendant's stables and storage sheds for the cars. The motive power upon defendant's cars, running out Harvard place, at this time, was electricity applied by means of the trolley system to cars formerly propelled by horse power, and in no wise changed, except that the electrical machinery had been placed thereon, but the cars themselves, in the structural part, for the carrying of passengers, remained unchanged, as did also the appliances for entering and alighting therefrom. Both the front and rear ends were open and unprotected by gates or other appliances, and presented the open ordinary step of a horse street car. On the morning in question two cars, propelled by electricity, supplied in each case by a motorman and a conductor, ran from the storage shed onto the Main street track, and from there switched onto the Harvard place track. The surroundings were these: Between the switch and the corner of Balcom street and Harvard place is a crosswalk, nearly in front of Sargent's saloon, so called, from forty to forty-five feet distant from the corner of Harvard place. Upon the last named corner stands Stemler's saloon, and across the street from that on the northwesterly corner is a green house. The intervening space between Stemler's saloon and the crosswalk is a clear open place with no obstruction to shut off the vision. Plaintiff established by five witnesses, including himself, that he arrived at the corner about nine o'clock in the morning, and stopped in front of Stemler's saloon to wait for the car; that the two cars came from the

shed and were switched onto Harvard place track and ran to the crosswalk, where the first car stopped, the other car stopping about seven or eight feet in its rear ; that the cars remained stationary three or four minutes at this point, and while so standing, plaintiff walked from in front of Stemler's saloon across the open space to the car, took hold of the iron in front of the dashboard on the front end of the car, placed one foot upon the first step, and while drawing his body up, the motorman suddenly started the car, which gave a shock or jerk, plaintiff was thrown off his balance, fell to the ground, and his legs, coming between the front and rear wheels of the car, were run over by the latter and were so injured that amputation of both feet became necessary. It was further shown, and under instruction from the court the jury have found, that the crosswalk where this car stopped was a place where the cars frequently stopped for the purpose of discharging and taking on passengers. The defendant gave evidence by three witnesses tending to establish that the car in question did not stop at the crosswalk on this morning, but continued in motion until after the happening of the accident ; and by two witnesses that plaintiff attempted to board the car while in motion, and failing to secure a firm hold, was thrown under the car. As before observed, this evidence is conflicting, and the jury have negatived defendant's contention. So far as plaintiff's witnesses were concerned, there is little, if anything, beyond the testimony of the defendant, above noted, which tends to discredit them. Three of them were former employes of defendant at the time of the accident, and two of them had voluntarily left its service after ; under what circumstances the third left, the case does not disclose. All that appears is that at the trial he was not in the employ of defendant. The two witnesses first noted sat but a short distance from the place of accident and in plain view of it ; the third was the motorman of the hind car ; he did not see plaintiff when approaching the car, but saw him as he was getting on, was positive the car was then stationary, saw it start, and saw plaintiff fall. The

fourth witness stood in front of Stemler's saloon in plain view of the whole transaction. There was an attempt made to contradict the testimony of plaintiff's witnesses or some of them, by showing that defendant's attorney, a short time after the accident, talked with them, and reduced their statements to writing, which were signed by them, in which they said the car was in motion when plaintiff attempted to board it. But the witness was unable to identify with certainty but one witness, Collins, who was defendant's witness, while the written statement was not produced and its absence was unaccounted for. There is, therefore, nothing which would justify the court in disregarding the testimony of these witnesses or from which we can say that they are in any view discredited. Applying ordinary rules, there is a fair preponderance of testimony in favor of plaintiff's theory. It is, however, claimed that the undisputed testimony fails to show that defendant was guilty of negligence. This claim is supported by the following suggestions: That the motorman was in his proper place and that plaintiff gave him no sign that he desired to or contemplated taking the car. That the motorman did not in fact see plaintiff until he was in the act of falling, and that there was nothing in plaintiff's actions prior thereto which conveyed or sought to have conveyed to the motorman's sense that he was intending to take the car, and that as this place was not a regular stopping place for a car, and it was in fact a violation of the rules of the company to stop there, no obligation was, therefore, imposed to look out for passengers at this place, which fact, as well as the fact that the corner where plaintiff first stood was a regular stopping place, which was, or at least ought to have been, known to him. That the manner in which the car was started was not shown to be negligent or that it was done in an unusual or unskillful manner. The testimony shows that the plaintiff walked from Stemler's towards the car; the space was open; when he walked toward the car he walked towards the motorman, and there was nothing more requisite for the motorman to discover him than to use his eyesight; nothing distracted

his attention ; there was no need of a signal, as the car was stationary, and that it does not appear that the motorman was making any move to start it ; when plaintiff reached the car it was motionless, and when he took hold of the rail of the car, and stepped upon the step, he was brought to within two or three feet of the motorman. All of these circumstances were before the jury, and upon them the court submitted the question to the jury. Did the motorman see the plaintiff, or, if not, ought he, in the proper discharge of his duties, to have seen him and known of his attempt to board the car? It needs no argument to prove that these circumstances authorized the jury to draw the inference that a proper discharge of duty would have apprised the motorman of plaintiff's presence and desire to take the car before it was started. The next suggestion is not supported by the testimony. Plaintiff's proof tended to establish that this crosswalk was a point where the cars frequently stopped and that passengers were taken up and let off at that point, and the motorman Coventry stated that he had stopped there a hundred times for that purpose, and he thought it was known to the motorman and conductor of this car, while Schabell testified that the barn boss, Philips, ordered him to stop his car there, and this latter statement stands uncontradicted. The court also submitted the question to the jury, and the jury negatived defendant's claim. Whether stopping at this point was in violation of defendant's rules was a mooted question. Two of plaintiff's witnesses stated that it was in violation of defendant's rules to stop there, while Coventry testified that he knew of no such rule, that it was never called to his attention, and that in fact at this time there were no rules for running these motor cars at that place. But if it be conceded that stopping at this point was in violation of defendant's rule, I do not see that defendant is aided. The fact that they did stop there and take on and off passengers is, as we have seen, established. If such a rule existed, there is not a particle of evidence to show that plaintiff had notice of it either actually or inferentially, no proof was given to show that it

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was posted in a car, or in a place where passengers would be likely to see it, or any means whatever adopted to bring it to the attention of passengers. While it is doubtless true that passengers are bound to observe reasonable rules and regulations, yet before they can be bound, the rule must in some manner be called to their attention in such a way that they may know, or be chargeable with knowledge of, its existence. *Baltimore City R. R. Co. v. Wilkinson*, 30 Md. 224.

A continued violation of defendant's rule, by its employes, instead of being notice to a passenger that a rule is being violated, may become, on the contrary, an assurance to the passenger upon which he may rely, that what is proper to do is being done. The fact that the car also stopped at the corner in no manner detracted from the force of the fact that it also stopped on the crosswalk. It is matter of little moment whether the car was started in the usual or in an unusual manner, whether skill was used or the reverse, the vice of the action lies in starting it at all, before the passenger had reached a place of safety. It has long been the settled law that where passengers are going on or alighting from cars propelled by steam, that to suddenly start the car, thereby endangering the safety of the person, without giving warning, is an act of negligence. *Keating v. N. Y. C. R. R. Co.*, 49 N. Y. 673.

And this rule has been applied to street cars propelled by horses. *Poulin v. Broadway R. R. Co.*, 61 N. Y. 621; *Maher v. Central Park R. R. Co.*, 67 id. 55; *Morrison v. Broadway R. R. Co.*, 130 id. 166; *Akersloot v. Second Ave. R. R. Co.*, 131 id. 599.

Stronger reasons exist for applying this rule to cars propelled by electricity, than to horse cars, as the motive power is more sudden and powerful in its operation. The jury were authorized to find that the act of starting threw plaintiff off and produced the injury. It is also argued that plaintiff was guilty of contributory negligence in attempting to board this car by the front platform. The testimony tended to establish that it had been customary

for passengers to leave the cars when propelled by horses, at either end of the car, with the sanction of those in charge. It was stated by Coventry that this custom continued after the application of electricity. The cars used were the same horse cars with a different motive power. Doubtless if a person were injured in attempting to board or leave a car by the front platform, custom would not alone protect him; whether negligent or not would be dependent upon the surrounding circumstances. It furnishes a circumstance to enable the court and jury to find the fact. But I know of no rule of law, and am cited to no authority, holding that an attempt to board a stationary car by the front platform is negligence *per se*. It is doubtless competent for a jury to find that under given circumstances it constitutes negligence, or for the court to so determine; as applied here I think it presented a question of fact. We must bear in mind that this was a place where passengers were frequently taken on and let off; such condition imposed upon the defendant and its agents an active affirmative duty to properly protect all passengers; so long as the car stood still it was as safe to board it by the front end as the rear end; that it would so stand until plaintiff could reach a place of safety was a matter upon which he might rely; under such circumstances it would be a harsh rule to characterize his act as negligent, when his position was only rendered dangerous by the negligent act of defendant. The charge of the court, upon special request of defendant, was more favorable than it was entitled to on this point. Upon this proposition, it is sufficient now to say, that upon the evidence, and the favorable charge, the jury have found for plaintiff, and the evidence and circumstances are sufficient to support their finding. *Briggs v. Union Street Ry. Co.*, 148 Mass. 72.

But one exception is urged upon our attention, and that relates to a refusal to charge. The request was: "I ask the court to charge the jury that the defendant is not chargeable with negligence if the motorman started the car while the plaintiff was attempting to board it by the front

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platform, if he was not aware of the plaintiff's presence there." This request was properly refused; it is seen at a glance that the request limits defendant's liability to the knowledge of the motorman, thus entirely excluding any consideration of the circumstances, which tended to show that if the motorman had properly discharged his duty, he ought to have known of plaintiff's presence. Such rule, if adopted, would have permitted the motorman to have been guilty of gross dereliction of duty, whereby he placed it beyond his power of being cognizant of plaintiff's presence, and then allege such negligence as a defense, because thereby he was deprived of knowledge of plaintiff's presence at the car. The court had already charged fully and favorably to defendant upon that proposition, and the discussion already had disposed of the question adversely to defendant. No other exceptions are argued, and our own examination discloses no error in any that were taken.

* * * * *

NOTE.— See note to *Kennedy v. City of Lansing*, post.

HENRY TANNER, Appellant, v. BUFFALO RAILWAY COMPANY, Respondent.

N. Y. Supreme Court, Gen. Term, Fifth Dept., Oct., 1893.

(72 Hun, 465.)

ELECTRIC RAILWAY.—DUTY TO PASSENGERS.—CONTRIBUTORY NEGLIGENCE.—CHARGE TO JURY.

For a person to “voluntarily and unnecessarily” stand upon the steps of an electric car going at the rate of more than six miles an hour, is “negligently” to do so. So held with respect to a request to instruct a jury.

APPEAL from judgment of Supreme Court, Erie county, upon a verdict for defendant, and from order denying motion for new trial upon the minutes.

George Wadsworth, for the appellant.

W. S. Jenkins, for the respondent.

DWIGHT, P. J.: The action was to recover damages for a bodily injury sustained by the plaintiff in falling or being thrown from the steps of an electric car operated by the defendant on Niagara street in Buffalo. The plaintiff intended to leave the car at Hudson street, and shortly before that crossing was reached he went to the rear end of the car, passed through the vestibule and stepped down on to the lower step, while the car was running at a speed exceeding six miles an hour, and stood there without taking hold of the car with either hand until the moment when, as he testifies, the speed of the car was increased by a sudden jerk, and he caught hold of the hand rod on the corner of the car with his left hand and attempted to sit down on the step behind him, but failed to do so, and either fell or was thrown to the ground, sustaining the injury of which he complains.

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The testimony on both questions, of negligence on the part of the defendant and of contributory negligence on the part of the plaintiff, was quite sufficient to sustain the verdict in favor of the defendant, and the verdict and judgment must stand unless the single exception taken by the plaintiff in the course of the trial points to error in the submission of the latter of those questions to the jury. That exception was to an instruction given to the jury, in response to a request of the defendant, in the following words: "That if the plaintiff voluntarily and unnecessarily placed himself on the step outside the car, before it came to a stop and while going at the rate of six miles an hour, whereby his injury was made possible, then he cannot recover."

Counsel for the appellant urge that this hypothesis excludes the element of negligence which was the one thing necessary to preclude a recovery by the party injured. But, of course, the effect of the instruction was that the conduct described was of itself negligence. As such, we think it was a correct instruction in this case, the question being left to the jury to say whether the conduct of the plaintiff was within the description given. "Voluntarily" and "unnecessarily" are comprehensive terms. They characterize the act to which they are applied as needless — not required by the circumstances of the case — and one which, if it involved danger to life or limb, was unreasonable and, in the nature of things, negligent. The same terms were employed, without the word "negligently," in the request to charge in the case of *Coleman v. Second Avenue Railroad Company*, 114 N. Y. 609, and it was held error to refuse the instruction. In that case there was evidence tending to show that the plaintiff had been crowded from his seat and was passing around on the side step of the open car in search of another. It was a question in that case whether the exposure to danger was voluntary and unnecessary. There probably was no question about it in this case, but it is not for the plaintiff to complain that the question was submitted to the jury.

In the case of *Coleman, supra*, the familiar rule was

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reiterated that if passengers without reasonable cause leave the car or place themselves on the outside of it when in motion, they assume the hazards of so doing, citing numerous authorities to that effect, and the term "without reasonable cause" is treated as substantially equivalent to the term "voluntarily and unnecessarily."

Under the authorities to which reference is made, we can have no doubt that the instruction to which exception was taken was one to which the defendant was entitled.

The judgment and order appealed from must be affirmed.
LEWIS and HAIGHT, JJ., concurred.

Judgment and order appealed from affirmed.

NOTE.—See note to *Kennedy v. City of Lansing*, post.

WILLIAM ELLIOTT V. NEWPORT STREET RAILROAD COMPANY.

Rhode Island Supreme Court, Nov. 8, 1893.

(23 L. R. A. 208.)

ELECTRIC STREET RAILWAY.—DUTY TO PASSENGERS.—CONTRIBUTORY NEGLIGENCE.

The plaintiff, while standing upon a running board of a motor car, with his face to the car, was brought in contact with a post maintained by the railway company, thrown from the car and run over by a trailer which followed. It was in the night, and he did not know of the proximity of the post to the track.

Held, that he was not chargeable with contributory negligence as matter of law, and that the direction of a verdict for the defendant, in an action brought to recover on account of the injuries received, was error.

APPEAL by plaintiff from a verdict entered for the defendant by direction of the court, in an action for personal injuries. Facts stated in opinion.

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Patrick J. Galvin and Charles Acton Ives, for plaintiff, in support of the motion.

Darius Baker, David S. Baker, Jr., and William C. Baker, for defendant, *contra*.

MATTESON, Ch. J., delivered the opinion of the court: This is an action of trespass on the case to recover damages for personal injuries alleged to have been sustained by defendant's negligence. The case was tried at the March term of the Supreme Court for Newport county. When the testimony on the part of the plaintiff had been submitted to the jury, the court directed a verdict for the defendant. The plaintiff thereupon excepted to the direction, and filed this petition for a new trial. The testimony shows that the plaintiff was injured September 1, 1892, while riding on one of the defendant's electric cars in Newport. The facts attending the injury were these: The plaintiff boarded the car a few minutes past 8 o'clock in the evening, at the foot of Touro street, on Spring street, with the intention of riding to Morton Park, in the southern part of the city. The car was an open one, with seats running crosswise, and with steps or foot boards on each side lengthwise of the car. This car had in tow another car. All the seats in both cars, and also the platforms, were filled with passengers, and passengers were standing on the foot boards. The plaintiff took a position on the foot board of the first car, on the left hand or easterly side of the car as it was going south, between the second and third seats from the rear end of the car, standing with his face turned towards the opposite side of the car, and holding on to the two stanchions supporting the roof of the car on either side of him. Instead of standing on the foot board, the plaintiff might have stood, if he had seen fit, between the seats inside of the car. Shortly after the car had started, while the plaintiff was reaching for his money to pay his fare, he was thrown from the car by coming in contact with a trolley pole, fell to the ground, and was run over by the wheels of the car in tow. No

objection was made by the conductor to the plaintiff's standing on the foot board, nor was he warned that there was any danger in doing so. Between Touro and Franklin streets the defendant's track ran close to the curbstone on the easterly side of Spring street. The cars were propelled by the trolley system. Between Touro and Franklin streets the poles supporting the trolley wire were located on the edge of the curbstone, so that the distance from the rail to the inner side of the pole varied from 26 to 28 inches. The distance between the inside of the poles and the outer edge of the foot board of a passing car varied from 10 to 12 inches; the distance in the case of the pole by which it is alleged the plaintiff was struck being 10 1-2 inches. The plaintiff did not know of the location of the pole at the point where he was injured. He did not notice any poles from the time he got on to the car until he was struck, and could not have seen them, in the position in which he stood, because they were behind him. He had never ridden over that part of the defendant's road prior to the accident, and was familiar with the street only as he had occasionally driven through it. From the point where the plaintiff got on to the car, to the point where he was thrown off, the car had passed eight poles, that by which the plaintiff was struck being the ninth.

The question raised by the plaintiff's exception is whether, on these facts, the court was justified in directing a verdict for the defendant. To have warranted the direction it must have clearly appeared,—so clearly that the court could say as a matter of law,—either that the defendant was not negligent, or that the plaintiff was guilty of negligence which contributed to the accident. We do not think that either of these propositions was sufficiently clear to warrant the court in taking the case from the jury, and directing a verdict for the defendant. Common carriers of passengers are required to do all that human care, vigilance, and foresight reasonably can, in view of the character and mode of conveyance adopted, to prevent accident to passengers. *Tuller v. Talbot*, 23 Ill. 357 (76 Am. Dec. 605); *Meier v.*

Pennsylvania R. Co., 64 Pa. 225 (3 Am. Rep. 581); *Topeka City R. Co. v. Higgs*, 38 Kan. 375; *Philadelphia & R. R. Co. v. Derby*, 55 U. S. (14 How. 468, 486, 14 L. ed. 502, 509.) It is a matter of common knowledge that railway companies daily undertake to carry, as did the defendant on the occasion in question, passengers greatly in excess of the seating capacity of their cars, that they stop their cars and take on passengers so long as there is standing room on platforms or foot boards and collect fares from those on platforms or foot boards as well as from those within the cars. Ought not the defendant, in view of the rule prescribing the duty of carriers of passengers, to have foreseen the possible danger to which passengers on the foot boards of its cars might be exposed by a slight turn of the body sidewise, or by a slight inclination of it backward, in consequence of the proximity of its track to its trolley pole at the point where the plaintiff was injured? We think so. *North Chicago Street R. Co. v. Williams*, '140 Ill. 275; *Topeka City R. Co. v. Higgs*, *supra*; *Gray v. Rochester City & B. R. Co.*, 61 Hun, 212; *Lehr v. Steinway & H. P. R. Co.*, 118 N. Y. 556.

But the question which has been chiefly argued is whether, on the facts recited, it sufficiently appeared that the plaintiff was guilty of contributory negligence to justify the direction of the court. The defendant conceded that it is not negligence *in se* for a passenger to ride on the foot board of an open car, but contends that, as the outside of a car is obviously more dangerous than the inside, it is incumbent on any one who rides there to exercise care commensurate with the danger. This proposition is doubtless correct. But we do not assent to the defendant's further contention that, if the passenger is injured while riding on the foot board, it is *prima facie* his own fault. Undoubtedly, by the law of this State, the burden is on him who sues for an injury to show that he was in the exercise of due care, and the question whether he was in the exercise of due care is to be considered with reference to the fact that he was riding in a dangerous situation. But the ques-

tion of contributory negligence is generally for the jury, the exceptions being where the facts are not controverted, or it clearly appears what course a person of ordinary prudence would pursue, or where the standard of duty is fixed, or the negligence is clearly defined and palpable. *Clarke v. Rhode Island Electric Lighting Co.*, 16 R. I. 463, 465; *Chaffee v. Old Colony R. Co.*, 17 R. I. 658, 683. A passenger who rides on the foot board of a car necessarily takes on himself the duty of looking out for and protecting himself against the usual and obvious perils of riding there, such, for instance, as injury from passing vehicles, or by being thrown off by the swaying or jolting of the car; assuming, of course, proper management of the car, and proper construction and condition of the road. We do not think, however, that the danger of being hit by a trolley pole is such a peril as a passenger whom the railway company has undertaken to carry on the foot board of its car is bound to anticipate and be on the lookout for, unless, indeed, it appear that the passenger had knowledge of the close proximity of the track to the trolley pole. He has a right to assume that the railway company has performed its duty in so constructing its road that its passengers, even on the foot boards of its cars, riding there by its permission, shall not be exposed to injury by the unsafe construction of its road. *City R. Co. v. Lee*, 50 N. J. L. 435, 439. The testimony does not show that the plaintiff knew of the close proximity of the defendant's track to its trolley poles. Moreover, the accident occurred in the evening, when, on account of the darkness, the danger of being struck by the pole would not be so apparent as in the daytime. Nor does the testimony show that the posture of the plaintiff on the foot board was an unusual one, or any movement of his which would naturally expose him to danger. The defendant's counsel argues that it is a necessary inference from the fact that he was struck that he was leaning backward at a considerable angle. The plaintiff's testimony was that he was in the act of taking his fare out of his pocket. The defendant's counsel, in argument, stated that

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the plaintiff illustrated his testimony by raising his arm as though to take his money out of his vest pocket. If this be so, the plaintiff's elbow, as he stood with his back to the trolley poles, would naturally project several inches beyond the line of his body, and a slight inclination would suffice to bring it into contact with a pole only ten and a half inches from the edge of the foot board. The fact that the plaintiff had already safely passed eight poles gives probability to the theory that the accident was due to the lifting of his arm in the manner stated.

Plaintiff's petition for a new trial granted.

NOTE.—See note to *Kennedy v. City of Lansing*, post.

GAFFNEY V. BROOKLYN CITY RAILWAY COMPANY.

City Court of Brooklyn (N. Y.) General Term, Nov., 1892.

(6 Misc. 1.)

ELECTRIC STREET RAILWAY.—DUTY TO PASSENGERS.—NEGLIGENCE.

If an electric street railway company ordinarily uses a chain upon the side of open cars to prevent passengers from getting on or off on the side next to the other track, the omission to have such chain in place is an invitation to passengers to get on at that side.

A motorman, knowing of such implied invitation, is bound to exercise more care when passengers are boarding a car at a station than when meeting another car in motion.

APPEAL by defendant below from a judgment awarding damages for personal injuries. Facts stated in opinion.

Jas. & Thos. H. Troy, for plaintiff (respondent).

Morris & Whitehouse, for defendant (appellant).

CLEMENT, Ch. J : The questions involved in this appeal

seem to be mainly of fact. The plaintiff and two witnesses called in her behalf testify that they were passengers on a train of the Fort Hamilton line, which stopped in Third avenue, in this city, at Twenty-fifth street; that the passengers were given transfer tickets, and many of them walked a short distance to take a Hamilton avenue car standing on the same track; that many of the passengers got on the car, which was an open one, on the side nearest the sidewalk, but that ten or fifteen went on the other side; that plaintiff was about to get upon the car when a car came down on the other track at a rapid rate of speed and struck her. The only witness for the company who saw the injury was the motorman. He testified that the plaintiff made a dart from behind the car, and jumped for the second stanchion, about four feet from the rear of the Hamilton avenue car, and fell under his car. It appeared that the company used chains on the sides to prevent passengers from boarding cars, and that the chains at the time were down on both sides of the car.

The place in question was a transfer station, and, as the company used chains when they did not permit passengers to enter a car, the fact that the same were down on the side next the other track was an invitation to passengers to enter the car on that side. We are also of opinion that the motorman, when he saw that passengers were entering a car at the station, was bound to exercise more care than when passing another car in motion, and particularly when he knew that the company invited passengers to enter on the side of the car near the other track.

The weight of evidence was on the side of plaintiff, and we can see no legal reason why the verdict of the jury should be disturbed.

Judgment and order denying new trial affirmed, with costs.

OSBORNE, J., concurs.

Judgment and order affirmed.

NOTE.—See note to *Kennedy v. City of Lansing*, post.

MAURICE GILBERT V. WEST END STREET RAILWAY COMPANY.

Massachusetts Supreme Judicial Court, Jan. 6, 1894.

(160 Mass. 403.)

ELECTRIC STREET RAILWAY.—DUTY TO PASSENGERS.—NEGLIGENCE.

In an action for personal injuries sustained by the plaintiff when alighting from an electric street car, held, that an instruction to the jury that if it was possible for the defendant to prevent the accident, it was guilty of negligence, was properly refused.

Also held, proper to charge the jury that if those in charge of the car had waited a reasonable time at a station for passengers to alight, and a passenger made no move to alight until the car started again, and gave the conductor no notice that he desired to do so, there was no negligence in starting the car.

APPEAL by plaintiff from judgment of Superior Court, Suffolk county, upon a verdict for defendant.

The following request to charge the jury was made by the plaintiff and refused: "That, if it was possible for the defendant to prevent this accident, then defendant was negligent."

The following requests of the defendant were charged, over the objection of the plaintiff: "(1) A common carrier is bound to delay at a station or stopping place only a reasonable length of time for the purpose of allowing passengers to alight, unless those in charge know, or have reason to know, that some passenger has not got off, and is desiring to do so. (2) Passengers on a street car, when at their place of destination, should leave the car with reasonable dispatch; and after the car has stopped a reasonable time, for passengers to get off, and as soon as all passengers destined for a particular place, or intending to get off there, have apparently left, and the conductor has no notice that any one else is trying to get off, then the

conductor may properly start his car. (3) If the car had stopped a reasonable time, and the plaintiff did not step from the car until after the car had started, and was not, at the time of starting the car, apparently in the act of leaving it, and the conductor did not know, or have any notice, or have reason to know, that the plaintiff was intending or desiring to get off there, then there was no negligence on his part in starting the car. (4) If the jury find that the car had waited a reasonable length of time for passengers to alight, and that the plaintiff delayed, and was not apparently in the act of leaving the car when the bell was given for the car to start, and the conductor had no notice or knowledge of the plaintiff's intention or desire to get off, then there was no negligence in starting the car. (5) The conductor was not bound to know that every passenger had left the car that was intending to leave it at that place, in the absence of any sign of such intention; and if, after waiting a reasonable time, he took reasonable means to see whether passengers were at the time leaving the car, and no one appeared to be leaving it, and the conductor did not know, or have any reason to know, that the plaintiff was intending to get off, there was no negligence in starting the car."

E. P. Carver, E. E. Blodgett, for the plaintiff.

W. B. Sprout, for the defendant.

FIELD, C. J.: The plaintiff fell from the running board of an open electric car, and was injured. The principal question of fact in the case was whether the plaintiff stepped from the running board to the ground after the car had started, or whether the conductor caused the car to start while the plaintiff was in the act of stepping off. Some other questions connected with this were whether the conductor caused the car to stop a reasonable length of time for passengers to alight; whether, at the time he caused the car to start after having it stopped, he had any notice or knowledge

CHARLES KENNEDY, by His Next Friend, v. THE CITY OF
LANSING.

Michigan Supreme Court, March 27, 1894.

(99 Mich. 518.)

ELECTRIC STREET RAILWAY.—DUTY TO PASSENGERS.—INJURY FROM
POLE.—LIABILITY OF CITY.

An electric street railway company which laid its track and erected its poles with municipal consent, placed the poles so near the track that a passenger standing on the running board of an open car was struck by a pole and injured.

Held, that the city was not liable upon the theory that the pole was an obstruction in the street.

APPEAL by plaintiff from judgment of Circuit Court, Ingham county, upon a verdict directed for the defendant.

S. L. Kilbourne and James Harris, for appellant.

Charles F. Hammond, for defendant.

MCGRATH, C. J.: Defendant granted to a street railway company the right to lay its track and erect its trolley poles along Elizabeth street. The track was laid along the east side of the traveled portion of the street, and the trolley poles were placed in the gutter, outside of the way intended for travel. Plaintiff, while riding on one of the street railway company's open cars, which are wider than the ordinary car, and while standing upon one of the side boards used as steps, came in contact with one of the trolley poles and was injured, and sues the city, alleging that the trolley pole was an obstruction in the street.

We think that the circuit judge was right in directing a verdict for the defendant. The municipality did not fix or direct the precise location of the tracks or the trolley poles, or determine the width of the cars. The tracks, cars, and poles are the property of the company, and incidents of

that particular system of transportation, as virtually so as are the horses, harness and vehicles of other systems. If an injury is occasioned to a passenger by a defect in a rail, or by reason of an improper adjustment of that system, the city can be no more held than if a passenger in an omnibus is injured because of the breaking of a defective axle, or because the horses were hitched too long or too short. The injury in the present case was not occasioned by the condition of the street, but by an improper arrangement of the appliances employed in a method of its use. Respecting the liability of the city, the case is the same as if plaintiff had been injured by contact with a car on a parallel track of a double track system. Municipalities are in no sense responsible for the adjustment of the parts of this mode of transportation. They may, by the exercise of the police power, prohibit such an adjustment as would endanger life, but the failure to exercise that power would not render them liable to respond in damages ; nor would the exercise of a prohibitory ordinance, its violation, and consequent injury, involve them in liability. They are, of course, bound to see that the construction of tracks in streets does not necessarily interfere with or endanger other uses of such streets, but they are not insurers of street car passengers against defects in the street car system itself.

The judgment is affirmed.

The other justices concurred.

NOTE.— In the fourteen preceding cases, the matters under consideration related to the duty of electric street railway companies to the passengers upon their cars, and questions of negligence and contributory negligence in cases of personal injury.

The following are memoranda of other decisions in cases of similar nature :

In *Piper v. Minneapolis St. Ry. Co.*, Minnesota Supreme Court, June 16, 1893 (52 Minn. 269), the action was brought by a passenger who had been injured while attempting to alight from an electric car. The car had been stopped at her signal, and she was in the act of getting off without unnecessary delay, when the car was suddenly started without notice or warning, and she was injured. Held, that it was not error to charge the jury that if the plaintiff was put in a position of peril by the sudden starting of

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the car, and jumped off as it started, and a person of ordinary prudence would have done the same thing, it was not contributory negligence.

In *White v. Atlanta Consol. St. Ry. Co.*, Georgia Supreme Court, March, 1893 (92 Ga. 494), an action for personal injuries, it was held not *per se* negligence for a person with a handkerchief in one hand and an umbrella in the other, to attempt to board an electric street car while the car was stopping to take on passengers, but before it had become entirely stationary; but that it was a proper question for the jury. Judgment of nonsuit reversed.

In *Beal v. Lowell & Dracut St. Ry.*, Massachusetts Supreme Judicial Court, Dec. 3, 1892 (157 Mass. 494), the plaintiff was standing upon the front platform of an electric car, when, on approaching a switch, the motorman suddenly turned on full power and the plaintiff was thrown off and injured. It was claimed that the switch was defective. Held, no error in charging the jury that "if standing upon the front platform as above described, would be an act of carelessness, or failure to exercise such a degree of care as men of ordinary prudence would exercise under the same circumstances," plaintiff could not recover.

In *Slaughter v. Metropolitan St. Ry. Co.*, Missouri Supreme Court, May 30, 1893 (116 Mo. 269), the plaintiff stepped upon the front platform of a trolley car and was told by the motorman to get off and go to the rear. While he was in the act of getting off, the motorman suddenly increased the speed of the car and plaintiff was thrown off and injured. Questions of contributory negligence and damages, mostly the latter.

In *James v. Duluth St. Ry. Co.*, Minnesota Supreme Court, Nov. 14, 1893 (55 Minn. 271), held, that while it may be the duty of the conductor of an electric car in case of a rush of passengers, to use reasonable effort to check it and prevent injury to those getting off, it is not his duty to assist an able-bodied passenger to alight, in absence of any appearance of special danger.

**MARY JANE HICKMAN, Respondent, v. THE UNION DEPOT
R. R. Co., Appellant.**

St. Louis Court of Appeal, Nov. 24, 1891.

(47 Mo. App. 65.)

**ELECTRIC STREET RAILWAY.—DUTY TO TRAVELERS.—COLLISION.—NEGLI-
GENCE AND CONTRIBUTORY NEGLIGENCE.**

A person driving upon the tracks of an electric railway is not a trespasser there, and while he must turn aside to meet a car or let it pass him, those in charge of the car must also use reasonable diligence to discern the danger to which he may be exposed.

The degree of care required of those in charge of electric street cars, and of travelers in highways crossed or traversed by them, to avoid collision, is much greater than in the case of horse cars, by reason of the greater speed and momentum.

To run an electric car more rapidly than is permitted by municipal ordinance, or to fail to ring a bell when approaching a street crossing, is negligence, for the result of which the railway company must answer, in absence of contributory negligence.

It is the duty of a traveler approaching the crossing of an electric street railway to both look and listen for approaching cars, and the failure of a trial court to so charge held, in the given case, reversible error.

Failure to so look and listen, if by so doing the accident could have been avoided, is fatal contributory negligence, unless those in charge of the car saw, or by the exercise of ordinary diligence could have seen, the plaintiff's peril in time to prevent the injury.

APPEAL from St. Louis City Circuit Court.

G. A. Finkelnburg, for appellant.

J. F. Merryman, for respondent.

BIGGS, J.: The defendant owns and operates an electric street railway in the city of St. Louis. The ordinances of the city, conferring the right to the use of the streets, among other restrictions, prohibit the defendant from running its

cars at a greater rate of speed than fifteen miles an hour. The road has a double track, and it extends north and south along the centre of California avenue. This avenue is sixty feet wide, and is intersected at right angles by Keokuk street, of like width. On the night of October 11, 1890, the plaintiff's son, while driving the plaintiff's horse and buggy, attempted to cross the defendant's track at the intersection of the above-named streets. There was a collision with one of defendant's cars, which resulted in damage to the horse and buggy. The present action originated before a justice of the peace to recover the damage. The plaintiff alleged that the collision was brought about by the negligence of defendant's servants in running the car. The defendant denied that its servants were careless and negligent, but averred that the accident was directly produced by the negligence of the driver of the horse. The plaintiff had judgment, both before the justice and in the Circuit Court, and the defendant, by successive appeals, has brought the case to us for review.

The defendant complains of the action of the court in giving and refusing instructions. Two assignments are based on the action of the court in refusing instructions asked by the defendant. The assignments may be considered together.

The refused instructions are as follows :

“You are instructed that it was the duty of the person driving plaintiff's buggy, before crossing defendant's railway tracks, to look and listen for approaching railway cars, and if you find from the evidence that the person in charge of plaintiff's buggy failed to look and listen, and that by looking and listening he might have observed the approaching motor car in time to avoid a collision, and that by the exercise of reasonable care he might have avoided such collision, then you will find for the defendant.”

“You are instructed that the defendant's cars have the preference in the use of its tracks, and that the driver of plaintiff's horse and buggy had no right to drive upon the

railroad tracks so as to obstruct or unnecessarily interfere with the passage of defendant's motor car; and, if the person in charge of the buggy drove upon said track without necessity, when a car was approaching at a short distance, and in sight, he was bound to exercise more care and diligence than he would in driving upon a common roadway to see that the car was not impeded and to avoid collision. It was the duty of plaintiff's driver, under such a state of facts, to stop the vehicle or to turn aside to avoid the car, and if, through negligence or wilfulness on his part in this respect, a collision ensued, the plaintiff is not entitled to recover damages against the defendant, provided the defendant exercised reasonable diligence to avoid the accident after it became aware of the danger to which plaintiff had been exposed."

The determination of these assignments requires a discussion by us of the nature and extent of the right of the defendant to the use of the streets for its railway, and the degree of care necessary to be exercised in running such a road to avoid injury to persons and property lawfully on the streets. And the questions thus presented necessarily involve the corresponding duty and care of the citizen, while using the street, to avoid such injuries.

The court told the jury in its instructions that, if the driver of the horse failed to exercise "ordinary care" in approaching the defendant's railway tracks, or in attempting to cross them, then he was guilty of contributory negligence, and the plaintiff could not recover, unless the jury further found that the defendant's servants in charge of the car could have stopped it in time to have avoided the collision, after they saw, or by the exercise of ordinary vigilance could have ascertained, the perilous position in which the horse and buggy were placed. The aim of the defendant's first instruction, which the court refused, was to supplement this charge, by informing the jury that, under the circumstances of this case, "*ordinary care*," as used in the court's instructions, required the driver of the

horse and buggy to listen and look for approaching cars on the defendant's road. It is conceded that this is the law applicable to steam railways, but the plaintiff's counsel argues that no such duty is imposed by law on a person approaching the crossing of an electric or cable railway.

In the discussion of this question we are substantially without precedent to guide us in its solution, because we are dealing with a new means of transportation, and a new use of the streets. But the principles of the common law are so comprehensive that they find ready application and govern in all business transactions, however novel or complex. When railroads were constructed, and the steam engine or locomotive was invented, the courts readily applied the principles of the common law to this new and dangerous agency, and, among other things, decided that it was negligence to run such a dangerous thing as a locomotive across a public highway or street without giving some warning of its approach. It is upon this principle that our legislation on the subject is based. The courts also decided that, although all persons were entitled to the free use of the public highways and streets, yet it was negligence for anyone to cross a railroad track at the crossing of a public highway without looking and listening for the cars. When the courts were asked to apply the same rule to a person crossing the track of a street railway, where the cars were drawn by horses, it was held that the same degree of watchfulness ought not to be exacted, because horse cars are not run at the same rate of speed as steam cars—are not attended with the same danger, and are not so difficult to check. Some of the courts also placed this rule on the additional ground that the horse railway had not the same right to the use of its track as a steam railway had to its track. We admit that the right of occupation is different, but we are not clear that this difference of tenure affords any reason for a different degree of vigilance on the part of the citizen. But we are not dealing with a horse car case. We have here an electric railway, a new and different motor power, and we are called upon to lay

down some general rules which should govern in its operation, and also say whether persons, before attempting to cross the track of such a railway, should look and listen for the cars. We do not think that it could be successfully maintained that the law requires only that degree of care in operating an electric road, which it exacts in running horse cars. The degree of watchfulness ought to be much greater in the one case than the other, because the danger of collision from the electric car is much greater by reason of its greater speed and momentum. We, therefore, think that the law requires, and common prudence dictates, that persons in charge of an electric car should not only keep a strict watch along all portions of the route, but that they should give warning of the approach of the car to a street or other public crossing. It is for like reasons that we think that a greater degree of watchfulness is imposed on the citizen in the one case than the other. It is asking but little of a person to use his eyes and ears in traveling along the streets of a populous city, especially when he knows, as it appears that the driver of the horse did in this case, that he is approaching the crossing of an electric or cable road. Therefore, we are unable to see why the courts should not so instruct the jurors, where electric or cable roads are concerned. It is done every day in steam railway cases, where the conditions are substantially the same. Our conclusion is that the court committed error in refusing the defendant's first instruction. Whether the error was harmless or not, depends upon other facts and circumstances which we will notice further on in this opinion.

The refusal of defendant's second instruction was proper. It is true that it is the duty of a person driving a wagon or other vehicle along a public street to give the right of way to the cars of a street railway, and it is wrong for such person to unnecessarily interfere with or obstruct the passage of cars. But the fact that such person drives on to the tracks of a street railway does not make him a trespasser thereon. He has a right to be there, but he must turn aside when he meets a car, or when it is necessary to

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let one pass. If he is placed in a position of peril by driving on or across the railway track, it is the duty of the person running the car, from which danger is to be apprehended, to use ordinary care, that is, a careful watch, to *discover* the danger to which he is exposed, and to exercise reasonable diligence to avoid the accident, and the defendant's second instruction was faulty because its closing sentence did not contain that qualification.

Let us now examine the evidence bearing on the accident, to determine whether the refusal of the defendant's first instruction was harmless. The presumption is that it was prejudicial. While we decide that it was the duty of the plaintiff's son to look and listen for cars before he attempted to cross the tracks of the defendant's road, yet a failure to do so did not amount to contributory negligence on his part, unless it can be reasonably inferred that, if he *had looked and listened*, the accident would not have happened. He testified that the motorman failed to ring the bell, but the motorman and conductor testify that the bell was rung. Under the defendant's evidence, therefore, the plaintiff's driver could have heard the bell, had he listened. He testified that he looked for the car before he came to California avenue, but, on account of an embankment and a high fence on the south side of Keokuk street, he could only see down the avenue for fifteen or twenty feet. He also declared that, when he reached California avenue, he looked each way for cars and did not see any, although he confessed that his view was unobstructed for several blocks in the direction of the car; that the car carried a large headlight and must have been in sight at the time he looked. These latter physical facts, which are conceded, force us to the conclusion that the witness was mistaken when he testified that he looked and did not see the car. As well might we be asked to accept the statement that he looked for the sun on a clear day, and failed to see it. The evidence tended to prove that the horse was going five or six miles an hour; that he could have been checked or stopped very quickly, and that his head was some twelve or fifteen feet from the

track on which the car was approaching when the driver first reached a point from which he had an unobstructed view of the track. These facts to which the driver of the horse testified have a tendency to prove that the accident could have been avoided, if the driver had only looked and made proper efforts to stop his horse after he discovered the car. We therefore conclude that the Circuit Court committed prejudicial error in refusing the defendant's first instruction. Without it, the jury might have concluded that it was not the driver's duty to look for cars.

The judgment will be reversed, and the cause remanded. All the judges concur.

ON MOTION FOR REHEARING.

BIGGS, J.: A re-examination of the questions involved in this case has confirmed us in the correctness of our opinion.

* * * * *

The case stands this way for retrial: If the persons in charge of the car were running it at a rate of speed greater than provided by ordinance, or if they failed to ring the bell when approaching the crossing of Keokuk street, they were guilty of negligence, and the defendant must answer for all resulting injuries to plaintiff's property, unless the driver of the horse was guilty of contributory negligence; that is, failed to listen and look for the approaching car before attempting to cross the track, when by so doing the accident could have been avoided. And even though the driver *was thus* guilty of contributory negligence, yet the defendant would still be liable, if the persons in charge of the car saw, or by the exercise of ordinary diligence could have seen, the perilous position of the plaintiff's property in time to have avoided the injury to it. This is the practical effect of our decision, and we do not think that it is so far-reaching in its effects as "to give to the defendant the right of California avenue in preference to the citizens of the city," as stated in the motion for rehearing. The fears of the plaintiff's counsel in this respect are groundless.

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There is a technical objection to the defendant's first instruction, which the court refused, which ought to be remedied on a retrial. It does not contain the modification that the defendant would in any event be liable, if its servants saw, or by the exercise of reasonable vigilance could have seen, the horse and buggy in time to have prevented the collision. The recent decisions of the Supreme Court seem to hold that an omission of this kind is not reversible error, or good ground for refusing an instruction, where the other instructions contain the necessary qualification. We think, however, that where an instruction purports to cover the whole case, it would be better if it stated the whole law.

The motion for rehearing will be denied. All concur.

NOTE.—See note to *Boerth v. West Side R. Co.*, *post*.

CARSON V. FEDERAL STREET AND PLEASANT VALLEY
RY. CO.

Pennsylvania Supreme Court, Jan. 25, 1893.

(147 Pa. St. 219.)

ELECTRIC STREET RAILWAY.—DUTY TO TRAVELERS.—COLLISION.—CON-
TRIBUTORY NEGLIGENCE.

For a traveler when about to cross an electric street railway track to fail to look for approaching cars is contributory negligence, which will bar recovery in case of collision.

APPEAL by defendant below from judgment of Court of Common Pleas, Allegheny county, awarding damages to plaintiff for injuries to his horses and wagon by collision with an electric street car. Facts stated in opinion.

Wm. A. Stone of Stone & Potter, for appellant.

Jacob H. Miller, with him *McBride*, for the appellee.

Opinion by Mr. Justice GREEN: The facts of this case do not seem to be involved in controversy. The defendant operates a line of street cars passing through Washington street, in the city of Allegheny. The plaintiff's team, in charge of Orr, the driver, was engaged in hauling along C street, in the same city. In going along C street to his destination, Orr's route crossed Washington street and the defendant's tracks therein at right angles. When he reached the intersection he neither stopped nor looked, but drove directly upon the defendant's track. When in this position, he looked up, and saw the car just upon him. There was no time to escape. His wagon was crushed, and he was injured.

This action is brought by his employer, who is affected by the contributory negligence of his employe. The question upon which the case turned in the court below was, whether the evidence of the plaintiff established contributory negligence in Orr, the driver. Upon this subject the learned judge instructed the jury that there was no rule of law that required the driver to "stop, look and listen," but it was for them to determine what it was his duty to do, and whether he actually did it on this occasion. They were thus left without any rule of law to apply, at liberty to make one to suit themselves for the purposes of this case, which the next jury might change to suit themselves, or disregard altogether. We cannot agree to this. The street railway has become a business necessity in all great cities. Greater and better facilities and a higher rate of speed are being constantly demanded. The movement of cars by cable or electricity along crowded streets is attended with danger, and renders a high measure of care necessary, both on the part of the street railways, and those using the streets in the ordinary manner. It is the duty of the railway companies to be watchful and attentive, and to use all reasonable precautions to give notice of their approach to crossings and places of danger. Their failure to exercise the care which

the rate of speed and the condition of the street demand, is negligence. On the other hand, new appliances, rendered necessary by the advance in business and population in a given city, impose new duties on the public.

The street railway company has a right to the use of its tracks, subject to the right of crossing by the public at street intersections; and one approaching such a place of crossing must take notice of it, and exercise reasonable measure of care to avoid contact with a moving car. It may not be necessary to stop on approaching such a crossing, for the rate of speed of the most rapid of these surface cars is ordinarily from six to nine miles per hour; but it is necessary to look before driving upon the track. If, by looking, the plaintiff could have seen, and so avoided an approaching train, and this appears from his own evidence, he may be properly non-suited. *Marland v. R. R.*, 123 Pa. 487. It is vain for a man to say he looked and listened who walks directly in front of a moving locomotive. An injury so received is due to his own gross carelessness. *R. R. v. Bell*, 122 Pa. 58; *Moore v. R. R.*, 108 Pa. 349. Orr testifies that he knew the crossing, that he listened for the sound of a gong, but not hearing it drove on the track, and was instantly struck. He drove in front of a moving car so near to him as to make a collision inevitable. If he had looked, he could have seen the car, and stopped, and the accident would have been avoided. Not to do so was, in the language of *R. R. v. Bell*, "gross negligence," and justly defeats the action brought to recover from another damages that were self-inflicted. It is the duty of one about to cross a street railway track, to look, so that he may not walk directly in front of a moving car to be struck by it. The first assignment of error is sustained. So also are the second and third.

The judgment is reversed.

NOTE.—See note to *Boerth v. West Side R. Co.*, post.

**CLARA L. RASCHER v. THE EAST DETROIT & GROSSE POINTE
RAILWAY COMPANY.**

Supreme Court of Michigan, March 4, 1892.

(90 Mich. 413.)

**ELECTRIC RAILWAY.—RIGHTS AND DUTIES IN STREETS.—COLLISION.—
CONTRIBUTORY NEGLIGENCE.**

The right of a street railway company is only an easement to use the highway in common with the public. It is bound to use the same care to prevent collision as is the driver of any vehicle. Its cars run more rapidly than an ordinary vehicle; therefore greater precaution should be taken to avoid collision. They should be lighted in the night time. Held, in a given case that failure to see an unlighted electric car in the night time was not contributory negligence so as to bar recovery.

APPEAL from judgment of Circuit Court, Wayne county.
Appeal from judgment of non-suit, upon ground of contributory negligence. Facts stated in opinion.

A. H. Wilkinson, for appellant.

Wm. H. Wells, for defendant.

MORSE, C. J.: Action for negligent injury. The case was taken from the jury by the circuit judge on the ground of the contributory negligence of the plaintiff.

The evidence shows that the defendant operates an electric street car line on Mack street, in the city of Detroit; that its track is laid in the centre of the street, and on the crown of the road bed, at the place where the accident occurred. The street is bad for driving, there being deep ditches on each side of the street; and the best place to drive a team is on the railway track.

Plaintiff resided on this street, and on November 27,

1889, was being driven home by her husband from the place where he worked. The vehicle was a top buggy drawn by one horse. At this time the electric railway had been in operation four or five months. Plaintiff and her husband came on to Mack street at its intersection with Gratiot avenue. When they reached Mack street, the husband testified that he looked to see if a car was coming, and did not see any. He could have seen an approaching car with light a mile and a half or two miles from where he looked. They drove on the track all the way. The husband saw no light or car until his wife exclaimed, "Oh, Herman, there is the car!" The horse was then on his hind feet, and he undertook to "lash him" off the track. The horse and front wheels got off, but the car struck the left hind wheel of his buggy, throwing the plaintiff out and injuring her. There was no head light on the car, and it was dark. The car was not lighted at all, either inside or out. It was running at the rate of 15 or 29 miles an hour. Before this time the cars upon that line were in the custom of using head lights when running after dark. The plaintiff herself testified that when they got to Mack street she looked up the street, and could see no car or light. After she started she did not look particularly for a car, as she thought, if there was one coming, they could see the light in time to avoid it. The first she knew of the approach of the car she saw a little blue flame on the trolley wire; then she saw the glass glitter in the car window, and called to her husband, who at once attempted to get out of the way.

The plaintiff was not negligent in driving upon this railway track. She had the same right to travel upon it as the railway company, save that it was her duty when she met a car, to get off, and give the car precedence. But she was not a trespasser upon the track in any sense. The right of the railway in the street is only an easement to use the highway in common with the public. It has no exclusive right of travel upon its tracks, and it is bound to use the

same care in preventing a collision as is the driver of a wagon or other vehicle. Beach, Contrib. Neg., section 89; *Adolph v. Railroad Co.*, 65 N. Y. 554; *Railroad Co. v. Hanlon*, 53 Ala. 81; *Shea v. Railroad Co.*, 44 Cal. 428.

The question whether, being on the track, the plaintiff and her husband used reasonable diligence and ordinary care to prevent the collision, was one for the determination of the jury. *Little v. Railway Co.*, 78 Mich. 205. The testimony shows that another person, some distance behind the plaintiff, did not see or hear the car until it was right upon plaintiff, and such was its speed that he was also unable to get away, and had his rig upset.

We think it was admissible to show on behalf of the plaintiff that the public were in the habit of driving and traveling on the railway track, as they had a perfect right to do, as bearing upon the question of defendant's negligence in running a car without a head-light, or any light at all, upon this street after dark.

It is the contention of defendant's counsel that a street car is a vehicle, the same as a wagon or omnibus, and is no more bound than any other vehicle to carry a head-light, or to give signals or warnings of its approach, and that there is no stronger reason why street cars should carry head-lights as signals to other travelers than other vehicles.

This is not the law. A street car can turn neither to the right nor left. It runs with greater rapidity and with greater momentum than a wagon or omnibus; therefore greater caution must be taken in its running to avoid collision. It ought to be lighted in the night time, so that its approach can be seen by other travelers; and between twilight and dark, if not lighted, it ought to be run so slowly as to avoid collision, or else give by some signal warning of its approach. Street cars have precedence, necessarily, in the portion of the way designated for their use. This superior right must be exercised, however, with proper caution and due regard for the rights of others; and the fact that it has a prescribed route does not alter the

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duty of the defendant to the public, who have a right to travel upon its track until met or overtaken by its cars.

The question of defendant's negligence under the testimony in this case was for the jury.

The judgment is reversed, and a new trial granted, with costs of this court to plaintiff.

The other justices concurred.

NOTE.—See notes to *Boerth v. West End R. Co.*, *post*.

CREAMER V. WEST END STREET RAILWAY CO.

Mass. Sup. Judicial Court, May, 1892.

(81 N. E. Rep. 391; 16 L. R. A. 490.)

ELECTRIC STREET RAILWAY.—DUTY TO TRAVELERS.—CONTRIBUTORY NEGLIGENCE.

A person who having alighted from one electric street car, steps upon the other track, where he is killed by a car going in the opposite direction from that which he has left, is not a passenger within the Massachusetts statute giving passengers certain rights of action for personal injuries. Circumstances held to constitute contributory negligence as matter of law.

ACTION for damages. Facts sufficiently appear in opinion.

J. D. Long, for plaintiff.

M. F. Dickinson, Jr., and *W. B. Spront*, for defendant.

BAKER, J.: The plaintiff's intestate was instantly killed on Warren street by an electric car, which, it was testified, was running at a speed of 15 miles an hour. His death, under the circumstances, gave the plaintiff a right to maintain an action under St. 1886, c. 140, if, when

killed, he was a passenger, or if, not being a passenger, he was in the exercise of due diligence. He had ridden as a passenger upon another car, which he had left immediately before he was killed. When struck he was walking across Warren street, having taken one or two steps from the place where he had touched the ground on leaving his car, and was between the rails of the track on which was the car by which he was struck. He had not reached or had time to reach the sidewalk of Warren street, but he had left the car on which he had been a passenger, and had begun his progress on foot across the street. We are of the opinion that he was not a passenger when the accident occurred, and that he ceased to be a passenger when he alighted upon the street from his car. The street is in no sense a passenger station, for the safety of which a street railway company is responsible. When a passenger steps from the car upon the street, he becomes a traveler upon the highway, and terminates his relations and rights as a passenger, and the railway company is not responsible to him as a carrier for the condition of the street, or for his safe passage from the car to the sidewalk. When a common carrier has the exclusive occupation of its tracks and stations, and can arrange and manage them as it sees fit, it may be properly held that persons intending to take passage upon or leave a train have the relations and rights of passengers in leaving or approaching the cars at a station. *Warren v. Railroad Co.*, 8 Allen, 227; *McKimble v. Railroad Co.*, 129 Mass. 542 (2 N. E. Rep. 97); *Dodge v. Steamship Co.*, 148 Mass. 207, 214 (19 N. E. Rep. 373). But one who steps from a street railway car to the street is not upon the premises of the railway company, but upon a public place, where he has the same rights with every other occupier, and over which the company has no control. His rights are those of a traveler upon the highway, and not of a passenger.

The plaintiff, therefore, cannot recover unless she shows by affirmative evidence that the deceased was in the exercise of due diligence to avoid injury in traveling upon the street. As was said in *Chaffee v. Railroad Co.*, 104 Mass.

108, 115, "the question of ordinary care is, in most cases, even when the facts are undisputed, a question of fact, which it is peculiarly the province of the jury to settle." But, as was also said in the same case, "if, as a matter of common knowledge and experience, the court can see that, upon all the undisputed facts, the plaintiff was not in the exercise of ordinary care, and that the injury he received was in part attributable to his want of it, the jury may be properly told, as matter of law, that he cannot recover." "If the whole evidence has no tendency to show care on the part of the person injured, but, on the contrary, shows that he was careless, it is the duty of the court to direct a verdict for the defendant." *Warren v. Railroad Co.*, & *Allen*, 227, 230, and cases cited.

All the material evidence bearing upon the question whether the deceased was in the exercise of due diligence is stated in the bill of exceptions. In the opinion of the presiding justice, it had no tendency to show that the deceased was in the exercise of due care, and, if this view of the evidence was correct, there should be judgment on the verdict which he ordered.

The time of the accident was about half-past 11 o'clock at night. The car on which the deceased was riding was an open car, drawn by horses, and going southerly on Warren street, approaching Savin street, near which he lived. The car had transverse seats, and he was sitting on the extreme left of the rear seat. There were two car tracks in the street, and his car was on the right hand track as he rode southerly. Savin street led off from Warren street to the left, and the car which struck him was running northerly on the track at his left. When the car on which he was had approached within 150 feet of Savin street, the conductor rang the bell for it to stop at Savin street. There was a stone crosswalk from Savin street across Warren street. The junction of these two streets was a regular stopping place for electric and horse cars, and was so marked with the usual posts. Before the car was actually stopped, and when

the deceased was within 5 or 10 feet of the crosswalk, he rose from his seat, and immediately stepped off the car, at right angles to the left. His car had slowed up, but was still in motion when he left it; and he stepped in front of another car going northerly upon the other track, and was instantly killed. The car upon which he had been riding came to a stop a few feet further on. The car which struck him was coming down hill, and was moving at a speed of 15 miles an hour. It was an electric car, of the open pattern, lighted, and crowded with people. The gong of this car was ringing, and the passengers upon it were shouting, singing, and whistling, and making a good deal of noise. The street was straight, and there was nothing except the passengers in front of the deceased, as he sat in his seat, to obstruct his view of the approaching car before he left his seat, and nothing after he rose to leave the car. When he rose from his seat, and started to get off, two men, one the conductor and the other a fellow passenger, who were standing on the platform immediately behind him, shouted to him to stop, but he did not appear to hear, and stepped right off on the street to go across, and was on the other track, having taken the first step, and being in the act of finishing the second when he was struck. When he rose to leave, the dashers of the two cars were opposite each other, and, when he touched the ground, the car which struck him was not more than five or six feet away. He made no reply to the warnings given him, and did not appear to hear them. The testimony was that he did not appear to pay attention to anything, and the witnesses saw no indication that he took any notice of the approaching car or of the warnings given, and that his movement in leaving was so sudden that there was only time to shout to him, and that he jumped from the car, and went right along. Without quoting at length from the testimony, it is sufficient to say that it discloses no single indication of the exercise of care or caution on the part of the deceased. There is no evidence that his senses were defective, and no suggestion, in the testimony, of any other reason for haste on his part in

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leaving the car than the fact that it was near his destination. We do not, of course, hold that it is, as a matter of law, negligent for one to leave a street car while it is in motion, or to attempt to cross a street car track without looking to see whether a car is approaching; but neither of these acts is evidence of due care, and we cannot discover in the testimony reported any evidence that the deceased exercised care or attention of any kind or degree. On the contrary, the undisputed evidence shows that, in spite of warnings from those in his immediate vicinity, he suddenly, without precaution, precipitated himself into a position of great and obvious danger. He no doubt had a right to expect that any cars which might be upon the other track would not run at a dangerous rate of speed, and would be lawfully managed; but this proper expectation could not excuse him from the exercise of all proper care, and does not relieve the plaintiff from the obligation of proving, by positive affirmative evidence, that the deceased was in fact in the exercise of due diligence. As there was no such evidence, a verdict for the defendant was rightly ordered.

Judgment on the verdict.

NOTE.—See notes to *Boerth v. West Side R. Co.*, *post*.

causing the injuries complained of. The plaintiff claimed that the defendant was negligent in running the car at an unusual and dangerous rate of speed, and in not giving timely signals of its approach to the street crossing. The defendant denied these allegations of negligence on its part, and alleged that the injuries were caused by plaintiff's own negligence, especially in driving upon the track without looking for approaching cars. Most of defendant's assignments of error, as well as of his argument, is to the point that the verdict was not justified by the evidence. An examination of the record, however, satisfies us that upon the questions both of defendant's negligence and of plaintiff's contributory negligence the evidence made a case for the jury. There was evidence reasonably tending to prove that the car was being run at an unusually rapid rate of speed (from fifteen to twenty miles an hour, according to several witnesses); that the speed was unchecked until after the collision occurred; that it was running on quite a heavy down grade, where it was more difficult to check the speed; that no signal of its approach was given until it was within forty to sixty feet of the crossing; that this was in a populous part of the city, and the streets in question, which are rather narrow, much used thoroughfares of travel; and that buildings on the corners necessarily obstruct the view from one street up and down the other, until a person is within a comparatively short distance of the crossing.

It is hardly necessary to say that upon such a state of facts, if found to be true, the jury would be justified in finding that the defendant was negligent.

Defendant's main contention, however, is that the evidence conclusively shows that plaintiff was guilty of contributory negligence. There was evidence tending to show that he was driving down Eighth street at a slow trot, say five miles an hour; that he heard no signal of the approach of cars; that on reaching the crossing he looked south, down Jackson street, and saw no cars; that he then turned his head to look the other way (by this time his horses' heads were just about over the nearest rail of the car track),

JOHN C. SHEA v. ST. PAUL CITY RAILWAY COMPANY.

Minnesota Supreme Court, July 7, 1892.

(50 Minn. 396.)

ELECTRIC STREET RAILWAY.—RESPECTIVE DUTIES OF COMPANY AND TRAVELERS.—COLLISION.

From the facts that an electric street car was run at the rate of 15 to 20 miles an hour over a street crossing, on a heavy down grade, in a location having narrow and busy streets, so built up as to obstruct the view of travelers approaching until near the track, and that no signal was given of the approach of the car until it was within 40 to 60 feet of the crossing, the jury was warranted in finding the railway company negligent, and chargeable in case of injuries sustained by collision.

The rule which requires travelers approaching a steam railroad track to look both ways for approaching trains, and charging them with contributory negligence, as matter of law, for failure to do so, does not apply in case of electric or other street railways.

APPEAL by defendant from judgment of District Court, Ramsey county. Facts stated in opinion.

Henry J. Horn, for appellant.

Erwin & Wellington, and *D. F. Peebles*, for respondent.

MITCHELL, J.: Action to recover damages for injuries caused by the alleged negligence of the defendant. The plaintiff was driving a hack along Eighth street, in the city of St. Paul, going east. As he approached the intersection of Eighth and Jackson streets (which cross at right angles), an electric street car of defendant was approaching the same point from the north, running down Jackson street. As plaintiff was crossing the railway track on the intersection of the two streets, the car collided with the hack,

ground that a street railway company is not required to pay compensation to the owners of abutting property. Street cars are in the main governed by the same rules as other vehicles on the street, and their owners have only an equal right with the traveling public to use the street—they have no proprietary right to any part of the street. Of course, there are some modifications of this general rule growing out of the necessities of the situation. For example, as street cars run on a track, they cannot turn out to one side of it. Hence what is called “the law of the road” does not apply to them. It would be inexpedient to attempt any complete enumeration of the modifications of or exceptions to the general rules of equality of rights between street cars and other vehicles used on the street. But it is certain that there is no modification or exception that relieves a street railway company from exercising, at least, as much care to avoid collisions with other vehicles as the owners of the latter are required to exercise in order to avoid collisions with the cars.

Defendant's requests to charge, the refusal to give which is assigned as error, are framed upon the theory that the street railway has such a proprietary and superior right to the part of the street where the track is laid that the duty of taking care to avoid collisions rests exclusively upon other “wayfarers.” For example, the second request was that “it is the duty of wayfarers using the street where railway tracks are laid to keep out of the way of trains of cars which are being operated thereon;” and the third was that the conductor or trainman in charge of such train or car upon the street has a right to assume that wayfarers will keep out of the way of approaching cars which are being operated upon the track of the railway.” These requests are framed upon an erroneous theory as to the respective rights and duties of street railway companies and others in the use of the street, and were properly refused. And, for the reasons already suggested, the rule that one approaching a railroad crossing upon a highway must look up and down the track before he attempts to cross, is not

applicable, as a hard and fast rule, to one who attempts to cross a street car track upon a public street. The failure to do so is not, as a matter of law, and without regard to circumstances, negligence. Notwithstanding plaintiff's failure to do so as soon as he might have done, the question of contributory negligence was, under the circumstances, one for the jury. Beach, Contrib. Neg. § 290; Shear. & R. Neg. § 462; *Lyman v. Union Ry. Co.*, 114 Mass. 83; *Chicago City Ry. Co. v. Robinson*, 127 Ill. 9 (18 N. E. Rep. 772); *Shea v. Potrero & B. U. Ry. Co.*, 44 Cal. 414; *Adolph v. Central Park, N. & E. Riv. R. Co.*, 76 N. Y. 530.

Counsel argues in his brief some matters that are not assigned as error, and which, for that reason, we cannot consider. What we have already said covers all the points in the case, worthy of special notice, which are raised by sufficient assignments of error.

Order affirmed.

NOTE.—This case is cited in *Davidson v. Denver Tramway Co.*, post. See notes to *Booth v. West Side R. Co.*, post.

GEORGE M. EHRISMAN V. EAST HARRISBURG CITY PAS-
SENGER RAILWAY CO.

Pennsylvania Supreme Court, July 13, 1892.

(150 Pa. St. 180.)

ELECTRIC STREET RAILWAY.—DUTY TO TRAVELERS.—COLLISION.—CON-
TRIBUTORY NEGLIGENCE.

The rule, generally recognized, requiring travelers when approaching the track of a steam railway, to "stop, look and listen," is in a measure applicable to one approaching an electric street railway. He must look as he approaches the track, and if there is any obstruction, must listen. For the driver of a loaded wagon, drawn by a horse walking slowly, to cross the track of an electric railway, without looking back for cars coming in the same direction as himself, at any point nearer than 50 or 60 feet from the place of crossing, held, negligence *per se*, so as to bar recovery for injuries sustained by collision.

APPEAL by defendant below from judgment of Court of Common Pleas, Dauphin county, awarding damages to plaintiff for personal injury.

L. W. Hall (with him *Francis Jordan, Charles L. Bailey, Jr., Robert Snodgrass* and *Samuel J. M. McCarrell*) for appellant.

C. H. Bergner (with him *Tryon H. Edwards* and *J. C. Durbin*), for appellee.

Opinion by Mr. Chief Justice PAXTON: On the 26th of August, 1891, the plaintiff was driving a one horse market wagon along second Street, in the city of Harrisburg. In attempting to cross the defendant company's road upon this street, his wagon was struck by a moving car, causing the injury for which this suit was brought. He was driving down the street in the same direction as the car; and

when about fifty or sixty feet from the track, according to his testimony, he looked out, but did not see a car coming. He then drove his horse, to use his own expression, "cat-cornered" across the track, and without looking out again before he crossed it. When seen by the motorman in charge of the car, his wagon was moving in the same direction, and the accident was evidently caused by pulling his horse directly across the track in front of the car.

The degree of care requisite to be observed in crossing the track of a steam railroad has been the subject of repeated decisions. In *Railroad Company v. Beale*, 73 Pa. 504, it was held to be the duty of the traveler to stop, look and listen before crossing the track. The rule was declared to be an unbending one, and a failure to observe it is negligence *per se*. The doctrine of this case was much criticized at the time, but is now generally accepted as the law in this country. Subsequent reflection and experience have only strengthened our view of its wisdom. We have no doubt that, in many instances, it has been the means of saving human life. If strictly observed, accidents at railroad crossings would be as rare as they are now frequent. No ruling, however wise, can avert the consequences resulting from negligence.

The large increase of street railways in our cities and large towns within the last few years, while it has added greatly to the convenience of citizens, has also added another element of danger. It is therefore necessary to define as nearly as may be the relative duties of street car companies and citizens at street crossings or other places.

There is this distinction to be observed between steam railroads and street railways. In the case of the former, they have the exclusive right to the use of their tracks at all times, and for all purposes, except at road crossings. Street railways have not this exclusive right. Their tracks are used in common by their cars and the traveling public. While this common use is conceded, and is unavoidable in towns and cities, the railway companies and the public

have not equal rights. Those of the railway companies are superior. Their cars have the right of way, and it is the duty of the citizen, whether on foot or in vehicles, to give unobstructed passage to the cars. This results from two reasons: first, the fact that the car cannot turn out, or leave its track, and, secondly, for the convenience and accommodation of the public. These companies have been chartered for the reason in part, at least, that they are a public accommodation. The convenience of an individual, who seeks to cross one of their tracks, must give away to the convenience of the public. It would be unreasonable that a car-load of passenger should be delayed by the unnecessary obstruction of the track by a passing vehicle. On the other hand, it is the duty of the companies to see that their motormen shall be on the alert, not only at street crossings, but everywhere on the tracks, to see that citizens are not run down and injured.

The rule to stop, look, and listen is applicable in part, at least, to crossing street railways. A person driving a vehicle has but to use his eyes to avoid such accidents. There is no danger as in the case of steam roads, of stopping a horse at the very edge of the track. When, therefore, a citizen attempts to cross such track it is his duty, when he reaches it, to look in both directions for an approaching car. It very rarely, if ever, happens that the street is so obstructed that the car may not be seen as the citizen approaches the track. It is his duty to look at that point, and if there is any obstruction, to listen, and his neglect to do so is negligence *per se*. This is an unbending rule, to be observed at all times, and under all circumstances. In the case of steam roads, a question sometimes arises as to the proper place to stop, look and listen. Where there is a fair doubt upon this question, we have held that it must be submitted to the jury. But no such case arises in the case of city railways. If the citizen looks just before he crosses, he avoids all danger of accident.

Applying these principles to the case in hand, it is manifest the plaintiff was guilty of contributory negligence. He

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never looked in the direction of the approaching car at the time he turned the head of his horse across the track. When he did look, he was fifty or sixty feet away, with a loaded wagon, and his horse walking slowly. Moreover, he did not cross directly, but in an oblique direction, which would add considerably to the time of crossing.

During that period an electric car would travel a considerable distance. The conductor may not have anticipated that the plaintiff would attempt to cross the track immediately in front of his car. Be that as it may, and conceding the negligence of the company, the contributory negligence of the plaintiff was so palpable that the court below should have so declared it as a matter of law, and instructed the jury to find for the defendant.

Judgment reversed.

NOTE—This case is cited in *Davidson v. Denver Tramway Co., Cont. Pass. Ry. Co. v. O'Harterson* and *Gilmore v. Fed. St. & Ry. Co., post*.
See notes to *Boerth v. West Side R. Co., post*.

**GILMORE V. FEDERAL STREET & PLEASANT VALLEY PAS-
SENGER RAILWAY CO.**

Supreme Court of Pennsylvania, Jan. 3, 1898.

(158 Pa. St. 31.)

**ELECTRIC STREET RAILWAY.—DUTY TO TRAVELERS.—COLLISION.—NEG-
LIGENCE.—CONTRIBUTORY NEGLIGENCE.**

Street railway companies have no exclusive right to the use of their own tracks; although their rights are in some respects superior to those of the general public.

It is their duty to use care to prevent injury to persons, who without negligence are unable at the moment to get out of the way of passing cars.

To run an electric car along a narrow and unlighted alley, on a dark night, at such a rate of speed that it cannot be stopped within the distance covered by its head light, is negligence.

To have a horse and wagon unguarded upon the track of an electric street railway is contributory negligence which will bar recovery in case of collision.

Case of this series cited in opinion: *Ehrisman v. East Harrisburg, &c. Co.*, ante, p. 486.

APPEAL by defendant below from judgment of Allegheny County Court of Common Pleas, awarding damages to the plaintiffs for injury to their horse and wagon by collision with an electric street-car. Facts stated in opinion.

W. P. Potter (*Wm. A. Stone* with him), for appellant.

Charles A. Sullivan, for appellees.

Opinion by Mr. Justice HEYDRICK: There was abundant evidence to justify a jury in finding the defendant company guilty of negligence. Street railway companies have not an exclusive right to the highways upon which they are permitted to run their cars, or even to use their own tracks. The public have a right to use these tracks in com-

Non with the railway companies ; and therefore, while the rights of the latter are in some respects superior to those of the former, as was said in *Ehrisman v. East Harrisburg City Passenger Railway Co.*, 150 Pa. 180, it is not negligence *per se* for a citizen to be anywhere upon such tracks. So long as the right of a common user of the tracks exists in the public, it is the duty of passenger railway companies to exercise such watchful care as will prevent accidents or injuries to persons who, without negligence upon their own part, may not at the moment be able to get out of the way of a passing car. The degree of care to be exercised must necessarily vary with the circumstances, and therefore no unbending rule can be laid down ; but there is no difficulty in saying that it is negligence to run a car along a narrow and unlighted alley, on a dark night, at a rate of speed that will not permit its stoppage within the distance covered by its own headlight. This, according to the testimony of defendant's own witness, its motorman, it did the night of the accident by which the plaintiffs' horse was injured.

But the plaintiffs' driver, according to his own testimony, was equally negligent. He left his horse and wagon standing unguarded upon the track, and went into a stable in close proximity. How long he was absent does not appear, nor is it material. It was his duty to exercise the same watchful care when upon the track that the law exacts of the railway company in running its cars. It is an unbending rule, to be observed at all times and under all circumstances, that a person about to cross the track of a street railway must look in both directions for approaching cars before attempting to cross. *Ehrisman v. East Harrisburg Passenger Railway Company*, *supra*; *Wheelahan v. Philadelphia Traction Company*, 150 Pa. 187, but compliance with this rule would be an idle ceremony if a person might afterwards stop his horse or vehicle upon the track, relax his vigilance, and, leaving his horse unguarded, go into a building in the vicinity, and there remain any length of time whatever. As well might a motorman desert his post of duty, and go into the car to speak to a passenger, or for any other purpose.

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For less negligence than that on the part of a gripman, this court recently sustained a judgment against a street railway company, the injured party being free from contributory negligence. *Schnur v. Citizens Traction Co.*, 153 Pa. 29. For these reasons the defendant's points ought to have been affirmed.

The judgment is reversed.

NOTE.—See notes to *Boerth v. West Side R. Co.*, post.

JOHN BERNARD GREELEY v. FEDERAL STREET & PLEASANT
VALLEY PASSENGER RY., Appellant.

Pennsylvania Supreme Court, Jan. 2, 1893.

(153 Pa. St. 213.)

ELECTRIC RAILWAY.—COLLISION.—DUTY TO TRAVELERS.—NEGLIGENCE. For an electric railway company to cut down the grade of the street, by the width of its track, some two feet, throwing the dirt from the excavation upon the street upon either side of the track and allow it to remain there several weeks; and then to run electric cars at a high rate of speed through the cut, would be gross negligence; and in a case where a horse was killed by a car run under circumstances as above set forth, held proper, in an action to recover damages therefor, to submit the case to the jury.

APPEAL by defendant below from judgment of Court of Common Pleas, Allegheny county, awarding damages for killing a horse.

W. P. Potter (*W. A. Stone* with him) for appellant.

Thomas J. Keenan, for appellee.

PER CURIAM: The only question here is, whether the court below erred in not giving a binding instruction in favor of the defendant, as requested by its second point.

We are unable to see how such an instruction could have been given under the facts as developed by the testimony. At the point where the accident occurred the defendant company had cut down the grade of the street, by the width of its tracks, some two feet. This was done in anticipation of a change of grade by the city. The dirt from this excavation was thrown upon the street upon either side of the track, and so allowed to remain for some weeks. On the 11th day of July, 1891, a boy seventeen years of age was riding a horse belonging to the plaintiff along the right-hand track, going away from the city. An electric car belonging to the defendant company was approaching on the other track. Just as the car and horse were nearly opposite each other, the horse, it is alleged, became frightened and attempted to climb out of the roadway over the embankment referred to. The boy pulled him back and attempted to dismount. While he was trying, as he says, to dismount, the horse was struck by the car, and died from the effects of the collision. There was evidence that the car was going through this cut at a high rate of speed for an electric car; faster than usual. If this be so, and the jury have so found, it was gross negligence on the part of the company. Their cars should have been run slowly and with great care, through a place of this description. The cut in the street, and the dirt piled up on each side of the track, was a work of its own creation, and for which it was responsible. It was an obstruction to public travel, and great care should have been exercised in running the cars at such a place. But for this obstruction it is not likely the accident would have occurred. The court below was entirely right in submitting the case to the jury.

Judgment affirmed.

NOTE.—See notes to *Boerth v. West Side R. Co.*, *post*.

**FREDERICK WILL, Appellant, v. WEST SIDE RAILROAD
COMPANY, Respondent.**

Wisconsin Supreme Court, January 10, 1893.

(84 Wis. 42.)

ELECTRIC STREET RAILWAY.—DUTY TO TRAVELERS.—NEGLIGENCE.

Proof that the motorman of an electric street car made no effort to lessen its speed when about to run down a heavily laden wagon which the driver was trying to get off the track, but was unable, on account of snow and ice making the rails slippery, held, to establish *prima facie* the negligence of the company, so that the direction of a verdict for the defendant in an action for injury caused by collision of the car with the wagon was error, for which the judgment must be reversed.

APPEAL by plaintiff from judgment of Superior Court, Milwaukee county. Facts stated in opinion.

Rose & Bell, for the appellant.

Danforth Becker and *Turner & Timlin*, of counsel, for the respondent.

ORTON, J.: On the conclusion of the testimony, and on the motion of the respondent's counsel, the court directed a verdict in favor of the defendant, and judgment was rendered accordingly. If the testimony of the plaintiff and his witnesses make a clear *prima facie* case in his favor, then it follows that the court erred in so directing a verdict. If the testimony of the defendant tends to rebut such *prima facie* case, then it is quite likely a case of contradictory or conflicting evidence, and it should be submitted to the jury.

The testimony of the plaintiff and his witnesses is not long or difficult to understand. On the 9th day of Janu-

ary, 1891, at about 4 o'clock P. M., the plaintiff and four other men were driving their teams to wagons loaded with large stone, on Wells street, in the city of Milwaukee, going east. A short distance back the plaintiff drove in and upon the south track of the defendant's railroad, and was driving along on that track. The four other teams were being driven on the street outside and south of said track, following each other. One or two of said teams were nearly opposite the team of the plaintiff, and the others were following closely behind. They saw an electric car of the defendant company, when it was about two or three blocks off, coming towards them with considerable speed on the track on which the plaintiff was driving. The plaintiff at once turned his team off the track north, and tried to have them pull the wagon off also; but there was snow and ice on the track and rail, which made the rail slippery, and the left forward wheel of his wagon slid along the rail, and his team was unable to pull the wagon off. He whipped and urged his team, and did what he could to get them to pull the wagon over, but without success. The wheel glided along the rail in this way from 75 to 100 feet. The plaintiff was sitting on one of the large stones on his wagon, and as soon as he saw the car coming towards him, he at once did everything in his power, and continued to do so, to get his wagon off the track. He could not have turned to the right, and attempted to drive off the track on that side, on account of the other teams and loaded wagons being in his way. If he had attempted to drive off the track on that side, and there had been nothing in his way, there was no certainty that his wheel would not have slid along the rail on that side, just the same. Indeed, the probability was that he would not have been more successful in driving off on that side than on the other. The motorman of the car, two blocks off, could have seen, and probably did see, that there was a wagon loaded with stone being driven on his car track, and that the driver was trying to get his wagon off the track. He could have seen, and probably did see, that the horses were turned clear off the track north, and were trying to pull the

wagon over and off the track. The right wheel of the wagon and that corner of the load were directly in front of him. He must have known when near, and in time to stop his car, what the trouble was, and that probably the plaintiff would not be able to get his wagon off the track in time for him to pass. The motorman, however, did not stop the car, or even lessen its speed, but drove ahead and square against the right wheel and corner of the loaded wagon, which drove the wagon and horses, with the plaintiff sitting on the load, several feet to the north of the track in a general wreck, and the plaintiff was taken out from under one of the wagon wheels, apparently lifeless. This is the testimony of the plaintiff and the four teamsters who were with him, with scarcely any disagreement. One of the teamsters did say that the plaintiff might have turned to the right, as no team was opposite to him ; but all the other witnesses testified that two teams were nearly opposite the plaintiff, and one of them testifies that he was talking to the plaintiff, who was on the north side of him. But that was not material. The plaintiff had a right to exercise his own best judgment as to which side he should turn out, and there is no evidence that he could have been more successful on one side than on the other. At least he did not know that he could, and after he had attempted to turn out on the north side it was too late to try the other side, even if there had been no obstruction on that side.

It may be proper to say that the testimony of the motorman, Cummings, does not make a good case for the company. He saw the trouble with the plaintiff's wagon, with the wheel sliding along the rail, and then put all his force on the brakes when he got about twenty feet from Thirty-second street, the place of the accident, and stopped the car just as it struck the wagon. He saw the plaintiff trying to get off the track when he got to Twenty-ninth street, nearly three blocks away ; and he thought the plaintiff got his wheel nearly over once, and then pulled it back again. So the motorman must have understood the reason why the plaintiff could not get off the track in ample time to have

stopped the car before it struck the wagon. It appears that he might, and should, have stopped the car before it came so dangerously near the wagon as twenty feet.

But I do not intend to pass upon the merits of the whole case on the conflicting evidence. It is sufficient that the plaintiff's evidence made a good *prima facie* case in his favor, for the jury would have had the right to believe that evidence rather than the conflicting testimony on behalf of the defendant. The plaintiff's evidence showed very clearly that the motorman was guilty of nearly, if not quite, gross negligence, and that the plaintiff used all reasonable means, under the circumstances, to get out of the way of the approaching car and avoid a collision, and was unable to do so.

The plaintiff cannot be charged with negligence, in driving on the track, for he had a lawful right to use any part of the street to drive on. He could only be held liable for not getting off the track and out of the way of the car when it came along and had the prior right to the use of the track. This he tried his best to do, and would have done so but for the accident that the rails of the track were wet and slippery and held his wheel by reason of the ice and snow. According to the evidence, the rails of the track are not in all places so high above the ground as at this place, and would not catch and hold a wagon wheel in this manner. There is no evidence that the plaintiff had any reason to anticipate or expect that he would be unable to drive off the track at any time, and get out of the way of the car, when he drove upon the track at this time. What evidence the defendant may be able to introduce on another trial to rebut the case made by the plaintiff or to contradict his testimony and that of his witnesses who were present at the time and place of the accident, we know not; and the jury may be able to reconcile the conflicting evidence, and that they have the right to believe the testimony on one side or the other. I do not wish to say any more than necessary, to affect the result of another

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trial. This was evidently not a case for the court to direct a verdict for the defendant. It was a very proper one to be submitted to the jury.

By the Court: The judgment of the superior court is reversed, and the cause remanded for a new trial.

NOTE.—See notes to *Boerth v. West Side R. Co.*, *post*.

**ROBERT WINTER V. FEDERAL STREET & PLEASANT VALLEY
PASSENGER RY., Appellant.**

Pennsylvania Supreme Court, Jan. 30, 1893.

(153 Pa. St. 26.)

**ELECTRIC STREET RAILWAY.—DUTY TO TRAVELERS.—COLLISION.—CON-
TRIBUTORY NEGLIGENCE.**

For a person to leave his horses standing upon the track of an electric street railway while he removed a safe from the wagon, held, negligence *per se*, so as to bar a recovery for injury to the horses by a car striking them.

APPEAL by defendant below from judgment of Court of Common Pleas, Allegheny county.

W. P. Potter (*Wm. A. Stone* with him), for appellant.

John R. Harbison (*Clarence Burleigh* with him), for appellee.

Opinion by Mr. Justice McCOLLUM: It was obviously unnecessary for the appellee to drive upon and occupy the railway tracks, as he did, for the purpose of unloading the safe. It was twelve feet and two inches from the curb to the nearest rail, and it sufficiently appears from the evidence produced by him that it was practicable to

remove the safe from the wagon to the store without encroaching upon the railway in any manner. It may be conceded, as this evidence shows, that it was easier to make the transfer from the rear end than from the side of the wagon. But it is clear that he needlessly obstructed the tracks in a fit of impatience, if not of anger, caused by the interruptions to which he had been subjected in his work by the passage of the cars, and in the expectation of saving thereby a little labor or a trifling expense in unloading. In this spirit, and for this purpose, he drove his horses directly across the track, so that their hind feet were on or near to one rail, and their fore feet were on or near to the other, and declared in substance that in this position they could be seen by the men in charge of an approaching car in time to prevent a collision. Having thus obstructed the track, and relying on the obstruction as sufficient and timely notice to the company that he was in possession of it, he proceeded to unload the safe; but before he succeeded in removing it from the wagon, he evidently realized that his position was insecure, because he requested his employer to look out for and stop the cars, and received from the latter an assurance that he would do so. It is essential to a correct appreciation of this position to bear in mind that it was taken near eight o'clock on a dark night in April; that the obstruction was directly across the tracks of a railway on which the cars were driven by electricity, and at a point where they ran on a descending grade. In the presence of these conditions, well known to the appellee, and in the absence of adequate cause therefor, his action in obstructing the appellant's road was negligent and reckless. It was not only an unjustifiable interference with public travel, and an inexcusable exposure of his own and the company's property to injury and perhaps destruction, but it imperiled the limbs and lives of the company's employes and passengers. If his horses were injured while in the position described by him, he is without just claim to compensation for the injury, because it was the direct result of his own negligence. Now that

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rapid transit is recognized and demanded as essential to the prosperity of, and the transaction of business in, our large cities, the use of the streets for individual conveyance is necessarily qualified so as to make such transit possible and to minimize its dangers. The substitution of cable and electric cars for the horse car and the omnibus is a change which renders impracticable and dangerous certain uses of the streets which were once permissible, and comparatively safe. It introduces new conditions, the non-observance of which constitutes negligence. It is the duty of property owners on streets occupied by cable and electric lines of railway, and of persons crossing or driving upon such streets, to recognize and conform to these conditions. The risk of a crossing or possession of the tracks of a railway operated by horse power is not to be compared with the peril involved in a crossing or occupancy of the tracks of a steam, cable or electric railway. The conditions are notably unlike, in the size, weight and speed of the cars, and in the power by which they are moved.

It is not clear from the evidence in the case that the appellee gave proper notice to the company of the presence of his horses on its road, that the company was in any default in respect to the discovery of the obstruction, and the subsequent control of its cars, or that the horses died in September from any injuries received on the railroad in April. But we need not discuss these matters now, as we are of opinion that the appellee's contributory negligence called for an affirmance of appellant's point and is a sufficient answer to his claim. The specification of error is sustained.

Judgment reversed.

NOTE.—See notes to *Beorth v. West Side R. Co.*, post.

CENTRAL PASSENGER RAILWAY COMPANY V. CHATTERSON.

Kentucky Superior Court, Feb. 1, 1893.

(14 Ky. L. R. 668.)

ELECTRIC STREET RAILWAY.—DUTY TO TRAVELERS.—COLLISION.—NEGLECT AND CONTRIBUTORY NEGLIGENCE.

For a person to leave a safe, unobstructed way, and cross over into the track of an electric street railway, which he must have known was being or about to be used by cars, without once looking back or taking any sort of precaution for his own safety, is contributory negligence *per se*. It is the duty of a motorman in charge of an electric street car to keep a lookout to avoid injury to persons or vehicles on the track in front of his car, and by sounding his gong or in some other way to give them timely warning of the car's approach.

Frismen v. East Harrisburg City Ry., *ante*, p. 486, followed as to respective duties of travelers and of street railway companies upon the tracks of the latter.

APPEAL from Jefferson Court of Common Pleas.

Humphrie & Davie, for appellant.

Stone & Sudduth, O'Neal, Phelps & Pryor, M. O'Doherty and *R. C. Davis*, for appellee.

Opinion of the court by Judge BARBOUR.: On the night of October 1st, 1891, as Mr. and Mrs. Chatterson were returning from the ball given by the "Satellites of Mercury" at the "Auditorium" in Louisville, their carriage, driven by their servant, collided with one of appellant's electric street cars and Mrs. Chatterson was thrown from the carriage and seriously injured.

To recover for this injury they instituted this action against the appellant, charging that the collision was the result of the gross negligence of its employees, and having

recovered a verdict and judgment of \$2,500 the appellant has appealed to this court.

Mr. Chatterson and his wife left the "Auditorium" about 11 o'clock, when a great many other persons were also leaving. There were two railway tracks on Fourth street, in front of the Auditorium, which was on the west side of the street. The west track was for the cars coming from the city, and the east track was for the cars returning to the city. Mr. Chatterson and his wife got into their carriage at the door of the "Auditorium," and as they did so they saw several cars on the east track near the door of the "Auditorium" receiving passengers to be carried into the city. They drove north on Fourth street in the same direction these cars would go, and after leaving the "Auditorium" passed a car standing on the east track filled with passengers.

Mrs. Chatterson, giving her version of the collision, says: "We started down the western track and passed a car standing on the eastern track. There we crossed the eastern rail of the western track and went between the tracks for a short distance. Then we crossed the western rail of the eastern track and went on the track upon which the car was standing, and then turned to cross the extreme eastern rail.

"The rails were very high there, and we only slid, and as we turned to cross, or after we had crossed the western rail of the eastern track, we suddenly became aware that a car was coming and running at a terrific speed. I had only time to say, the car's coming, and Mr. Chatterson said, 'drive down the track as fast as you can,' thinking to distance the car, as he knew he could not cross. We were standing directly upon the track and he never made a single attempt to stop that car and there was not a bell rung."

Charlie Hughes, the driver of the carriage, says: "I drove northward on the west side of the street about twenty-five feet, I reckon. We started off between the two tracks, then I drove up a piece and straddled the first rail of the right hand track coming in. I drove on a piece and

was thinking of crossing and Mr. Chatterson told me to drive across. It was very rough along there, so in driving along Mr. Chatterson says, 'look out.' I looked back and a car was coming and he said, 'drive down the track.' I was in the act—the team was nearly in this shape then—and he says, 'drive down the track.' And I aimed to drive right back down in the track, and the car struck the hind wheel. I drove about thirty feet or such a matter straddle the west rail of the east track before I started to cross. I do not remember of any notice of the car's approach; don't remember of hearing anything only Mr. Chatterson's 'halloo.' " Upon cross-examination he said the car hit the carriage just as he looked around. We have recited the material part of the plaintiff's evidence bearing on the question of negligence. For the defendant there were five or six witnesses who say they saw the whole occurrence and their evidence is materially different from that of Mr. Chatterson and the driver. These witnesses state that after the car started from the "Auditorium" they went north about two hundred feet when the car was stopped by a horse on the track and delayed a few minutes while the horse was gotten off. The car was started again, and was going at about the usual speed of a mule car when it collided with Mr. Chatterson's carriage. They saw the carriage before the collision driving on the west track a safe distance from the car, and where, if it had remained, a collision with the car would have been impossible, when suddenly the driver attempted to cross right in front of the car. They say that the motorman did all in his power to check the car as soon as the danger to the carriage was seen, and that the car was stopped within a very short distance—within twenty or twenty-five feet. The motorman says that going at the speed he was he could have stopped the car, and did stop it, within a distance of ten feet.

* * * * *

But from the evidence before us it seems that the plaintiffs were clearly guilty of contributory negligence, and the court should have so told the jury. The relative duties of

street car companies and citizens have never been defined in this State; but we think they have been so plainly and so correctly stated by the Supreme Court of Pennsylvania, in the case of *Ehrisman v. East Harrisburgh City Railway*, 24 Atlantic Reporter, 596, that we adopt the rule laid down by that court without qualification.

The court said: "There is this distinction to be observed between steam railroads and street railways. In the case of the former they have the exclusive right to the use of their tracks at all times and for all purposes except at road crossings. Street railways have not this exclusive right. Their tracks are used in common by their cars and the traveling public. While this common use is conceded and is unavoidable in towns and cities, the railway companies and the public have no equal rights. Those of the railway companies are superior. Their cars have the right of way, and it is the duty of the citizen, whether on foot or in vehicles, to give unobstructed passage to the cars. This results from two reasons: First, from the fact that the car cannot turn out or leave its track; and secondly, for the convenience and accommodation of the public. These companies have been chartered for the reason, in part at least, that they are a public accommodation. The convenience of an individual who seeks to cross one of the tracks must give way to the convenience of the public. It would be unreasonable that a carload of passengers should be delayed by the unnecessary obstruction of the track by a passing vehicle."

Now, the plaintiffs, when they got in their carriage to go home, knew that there was a large crowd at the "Auditorium," many of whom were going home at the same time they were, and that a good part of them would go upon the cars; the cars were in position waiting to receive them. No cars were then coming out—at least none were in sight. The west track of the railway was unobstructed. The street was crowded with hacks and other vehicles. Under these circumstances the plaintiffs were, in our opinion, recklessly careless in leaving a safe, unobstructed way, and crossing over on to a track which, as reasonable people, they

must have known as being used or about to be used by the cars, without once looking back or taking any sort of precaution for their own safety.

At the same time, it was the duty of the motorman to keep a lookout to avoid injuring persons or vehicles on the track in front of his car, and by sounding his gong or in some other way to give them timely warning of his approach. The motorman says, going at the rate of speed he was going at the time, he could have stopped the car within ten feet. Mr. Chatterson's carriage, if his driver is to be believed, had been running in front of the car on the west rail of the track the car was on for thirty feet. Upon these facts it was for the jury to say whether, after the plaintiffs had by their negligence placed themselves in a perilous position, the employees in the control and management of the car saw or could, by the exercise of ordinary care, have seen the peril, and, with the means at their command, could have avoided the collision. If they could have done this the company is liable. The citizen in using the street was not a trespasser, as would be the case of one using the track of a steam railroad when it had the exclusive right to the use; and the employees of the street railway are not only liable for injuring those whom they see are in peril and could by reasonable care avoid injuring, but for carelessly injuring those whose peril they ought to see. The fourth instruction given by the court embraces this idea and is unobjectionable.

We fail to see anything in the evidence tending to show gross negligence on the part of the defendant's employees, and the court should not have given the instructions authorizing punitive damages in the event the jury believed the defendant was guilty of gross negligence.

For the reasons given we are of opinion that the judgment is erroneous, and it is, therefore, reversed, and the cause is remanded for further proceedings.

NOTE.—This decision seems to have been affirmed by the Court of Appeals, Jan. 12, 1895 (29 S. W. R. 18).

See notes to *Boerth v. West Side R. Co.*, *post*.

HENRY A. BERNHARD, Respondent, v. ROCHESTER RAILWAY COMPANY, Appellant.

N. Y. Supreme Court, Gen. Term, Fifth Dept., March, 1893.

(68 Hun, 369.)

RIGHTS AND DUTIES AT CROSSINGS, OF ELECTRIC STREET CARS AND OTHER VEHICLES.—COLLISION.

At a street crossing, an electric street car has no paramount right of way over any other vehicle.

Therefore it is the duty of a motorman, seeing a wagon crossing the track ahead of his car, to slow up and enable it to cross in safety.

At other places in the street the car has the paramount though not exclusive right; travelers should get off the tracks in front of approaching cars, and motormen should not carelessly run them down.

APPEAL from judgment entered upon verdict of jury, at Monroe County Court, and from order denying defendant's motion for new trial upon the minutes.

Charles J. Bissell, for the appellant.

John A. Bernhard, for the respondent.

HAIGHT, J. : This action was brought to recover the damages which the plaintiff sustained to his horse and wagon by reason of a collision with one of the defendant's street cars. The defendant was engaged in operating a double-track electric street railway in Lyell avenue in the city of Rochester; the avenue runs east and west; Sherman street intersects the avenue at an acute angle from the northwest; the plaintiff was a grocer and had a horse and wagon for the purpose of delivering groceries; his driver, with the horse and wagon, approached Lyell avenue through Sherman street, and on reaching the avenue stopped to allow a westerly-bound car to pass; at this point he could see west-

erly on the avenue 200 feet; he looked but saw no car approaching from that direction; as the westerly-bound car passed he started to drive across the avenue to the southerly side thereof; the horse and the fore part of the wagon had passed the southern track when the defendant's easterly-bound car struck the rear of the wagon, causing the damages complained of.

It is claimed on behalf of the appellant that there was no negligence chargeable to the defendant, and that the collision occurred through the negligence of the plaintiff's driver, and that the trial court erred in denying its motion for a nonsuit, and in refusing to direct a verdict in its favor.

We are of the opinion that no error was committed in this regard, and that these questions were properly submitted to the jury. The plaintiff's driver testified that he did not hear the bell ring upon the defendant's car, but other evidence tends to show that it was rung. We shall, therefore, assume that it was sounded, as testified to by the defendant's witnesses. The plaintiff's driver was passing across the avenue on an angle coming from Sherman street, in a covered wagon with his back partially toward the approaching car; he sat in front of his wagon, and looked west as he entered the avenue; the westerly-bound car, in a measure, obstructed his view, so that he did not see the car approaching upon the southerly track. He first approached the crossing, and was partly across when the collision occurred; the opportunity of the defendant's motorman to see the approach of the plaintiff's wagon was equally as good, if not better, than that of the plaintiff's driver to see the approach of the defendant's car; the westerly-bound car doubtless obstructed the vision to some extent, of both the motorman and the driver, but it is apparent that had the motorman been upon his guard and had proper control of his car, he could have seen the wagon in time to have stopped his car, and avoided the injury. His own evidence is to the effect that he was running at a speed of six to seven miles an hour when he struck the wagon;

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other evidence tends to show that he was running at a much higher rate of speed ; that he saw the plaintiff's rig as it was coming out of Sherman street into the avenue ; that the west-bound car prevented him from seeing it for a while ; that plaintiff's horse and wagon was traveling diagonally across the track or street in the same direction that the car was going ; that the horse was on a trot, and so continued until the wagon was struck ; that when he first saw the wagon after the car had passed he was pretty near to it, within six or eight feet ; that he rang his bell, but the plaintiff's driver did not seem to pay any attention to it.

It thus appears that he approached the plaintiff's wagon at a speed of six or seven miles per hour, from the rear, as it was passing diagonally across the track, the horse on a trot, going with the car at the crossing where Sherman street enters the avenue, overtook the wagon, and ran into it.

The plaintiff's horse and wagon were lawfully in the street, the driver had a right to cross the defendant's tracks, exercising reasonable care, and had the right to assume that the defendant's motorman would exercise like care to prevent running into him. It was a public highway, and each party had a common right to its use. The defendant's cars can only run upon the rails ; they cannot turn to the right or left to avoid teams ; they are, therefore, given a paramount right to the use of the tracks, but not an exclusive right. A person may lawfully drive along or upon the tracks, but he should not carelessly or wilfully obstruct the passage of the cars, and as one approaches, he should turn off from the tracks, so as to allow it to pass, and in a reasonable manner respect the paramount right of the corporation. On the other hand, the corporation must recognize the rights of the person, and not carelessly run him down, but give the necessary time and a reasonable opportunity to move off from the tracks, and allow the cars to pass. Such is the rule of the street. *Fleckenstein v. The Dry Dock, East Broadway & Battery R. Co.*, 105 N. Y.

655; *Adolph v. The Central Park, North & East River R. Co.*, 76 id. 530.

But at a street crossing, the rule is different; the car and the vehicle each have the right to cross, and neither has a superior right to the other. The right of each must be exercised in a reasonable and careful manner, so as not to unreasonably abridge or interfere with the right of the other. *O'Neil v. The Dry Dock, East Broadway & Battery R. Co.*, 129 N. Y. 125-130.

The collision, in this case, as we have seen, occurred at the crossing of Sherman street, or at the place where Sherman street intersects the avenue. The plaintiff's driver was properly passing across the avenue, to the right side thereof, intending to continue east along the avenue; he first approached the track, was partially across when struck; the car had no superior right to the crossing, and the motorman, finding the vehicle in the act of crossing, should have timely slowed up so as to have allowed it to cross in safety.

The judgment should be affirmed.

All concur.

Judgment and order of County Court of Monroe county appealed from affirmed, with costs.

NOTE.—This case is cited in *Meisch v. Rochester Elec. Ry. Co.*, post.
See note to *Boerth v. West Side R. Co.*, post.

LUCIUS E. WATSON V. MINNEAPOLIS STREET RAILWAY COMPANY.*Minnesota Supreme Court, June 27, 1893.*

(53 Minn. 551.)

ELECTRIC STREET RAILWAY.—DUTY TO TRAVELERS.—COLLISION.—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.—EVIDENCE.

(Head-note by the court):

One who had been a conductor of an electric street car for two months, *held* competent to testify within what distance such a car, going at a specified rate of speed, can be stopped.

At a street crossing, as high a degree of care is required of those in charge of an electric street car as of those driving other vehicles.

A street railway car has no priority of way at a street crossing, with respect to other vehicles, and when the driver of such another vehicle, approaching the street railway track to cross it, sees a car approaching at such a distance that he can apparently make the crossing safely, he has a right to attempt it, and it is not negligence *per se* in him to attempt it without looking a second time at the car.

Upon much traveled streets in a city it is negligence to run an electric street railway car over a crossing at a high and dangerous rate of speed; and it is also negligence to run it over a crossing, the person in charge of it not being on the lookout, nor having the car under control, nor using the proper means to stop it, so as to avoid a collision.

Case of this series cited in opinion: *Shea v. St. Paul City Ry. Co.*, *ante*, p. 481.

APPEAL by defendant below, from judgment of District Court, Hennepin county, in an action for personal injuries. Facts stated in opinion.

Koon, Whelan & Bennett, for appellant.

Merrick & Merrick and *H. H. Merrick*, for respondent.

GILFILLAN, C. J.: The witness Walden showed himself competent to state within what distance an electric railway car going at the rate of fourteen miles per hour (at which

rate some of the evidence indicated the car which injured plaintiff was going) can be stopped. He had been conductor on such a car two months, must have seen such cars stopped many hundreds of times, when going at as high a rate of speed as they ordinarily attain, and was at the time conductor on the car which did the injury. It must be presumed that he was an ordinarily observant man, and, if so, he must have been able to express a pretty accurate opinion on the point.

The evidence made a fair case for the jury, both as to the negligence of the defendant and the contributory negligence of the plaintiff.

* * * * *

The court below, in its general charge, in connection with some requests to charge, given and not excepted to, stated clearly and concisely the rules of law applicable to the respective rights of the parties upon the street, and the duty of each in respect to care in making the crossing, and the matter of negligence or absence of negligence on the part of either or both the parties. The only objection to the general charge insisted upon in appellant's brief, is to a part where the court, after stating the degree of care required of each of the parties, said: "If two teams collide in the street, you must determine by the same rules whether they were using reasonable care toward each other, and, if not, who is to blame." The only suggestion in the brief, of error in this, is that there is a difference between an electric car, running on fixed track, and a team able to turn to the right or left. That is an important consideration when at the time of the collision the car and other vehicle are passing along the same streets, and the question is which ought to have made way for the other. But the collision in this case was at a crossing, and there is no question which ought to have turned to the right or left to let the other pass. Requiring of those in charge of an electric car at a street crossing the same degree of care as is required of the drivers of other vehicles is not stronger than was laid down in *Shea v. St. Paul City Ry. Co.*, 50 Minn. 395

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(52 N. W. Rep. 902), where it was said: "There is no modification or exception that relieves a street-railway company from exercising at least as much care to avoid collisions with other vehicles as the owners of the latter are required to exercise in order to avoid collisions with the cars." So that the degree of care required of a street-railway company at a crossing, by the clause quoted from the charge, to wit, that required of the driver of any other vehicle, was not overstated,

* * * * *

The giving of plaintiff's fourth request is assigned as error. That request comes, at least, very near to being obnoxious to the criticism we have made upon several requests on the part of the defendant, and it is necessary to consider if it could have misled the jury. It may be divided into two parts: the first relating to the question of plaintiff's negligence; and the second to that of defendant's negligence. The first part is the proposition that if, when plaintiff was about to cross, the car was not on that portion of the street over which he attempted to cross, and was not threateningly near, or threateningly approaching the same, or if there was nothing to warn the plaintiff of its approach, or of the rate of speed at which it was approaching, he might lawfully drive across said track. The objection to this part of the request is that it ignores the conceded fact in the case, that he saw the car as he approached the crossing, from which it is claimed that warning of the car's approach was unimportant. As he was about to cross he saw the car just coming off of Twelfth avenue, nearly a block away from him, and there was no evidence that he saw it again till he was already on the track, and it was too late for him to avoid a collision. The request is to be understood, and the jury must have understood it, with reference to that situation. If he had no other notice of its approach than having seen it a block away, and no warning that it was approaching at such a rate of speed that he could not safely attempt to cross, he had a right to do so, unless he was bound, seeing it at that distance, to stop till

it passed. But, as held in the *Shea* case, a car on a street railway has not, as from the necessity of the case has a train on an ordinary steam railway, a priority of way at the crossing. Of course it would be negligence to attempt it when one has reason to believe that the car cannot be controlled or checked so as to avoid a collision before he gets across. But, with the uncontradicted evidence in the case as to the distance within which the car could be stopped, one seeing it nearly a block away, as he was about to go upon the crossing, would not have any reason to suppose it dangerous. There was no error in that part of the request. After what we have stated above from the request, it continued: "And if, in the exercise of ordinary care, as a prudent person, in so doing, he was injured through the negligence of the defendant in." Then follows the specification of acts or neglects which the court, in effect, charged would be negligence. The first of these, to which attention is called by appellant's brief, is: "If said car was running at a high and dangerous rate of speed." There can be no question that upon much traveled streets in a city, that would be negligent. The second is: If the person in charge "was not then on the lookout, and did not have his car under control; did not use the proper means or necessary means to stop said car, and avoid such collision." What is thus indicated as the duty of one in charge of such a car is not higher than would be required of an ordinary, prudent person in propelling through the thronged streets of a city so dangerous a vehicle as an electric car. The neglect of that duty would be negligence.

* * * * *

Order affirmed.

NOTE.—See notes to *Boerth v. West Side R. Co.*, post.
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PAUL BOYER V. ST. PAUL CITY RY. CO. ET AL.*Minnesota Supreme Court, June 30, 1893.*

(54 Minn. 127.)

ELECTRIC STREET RAILWAY.—DUTY TO TRAVELERS.—NEGLIGENCE.

Held proper for jury to find that fifteen to twenty-five miles per hour is a dangerous rate of speed for an electric street railway car.

Circumstances held to not establish contributory negligence as matter of law.

Case of this series cited in opinion: *Shea v. St. Paul City Ry. Co.*, *ante*, p. 481.

APPEAL by defendant below from order granting new trial after judgment of nonsuit.

Action for personal injuries. Facts stated in opinion.

McCafferty & Noyes, for appellants.

E. S. Thompson and John C. Bullitt, for respondent.

VAN DERBURGH, J.: This action against the defendants, for a personal injury sustained by plaintiff, was dismissed at the trial because the court deemed that the plaintiff was clearly shown to be guilty of contributory negligence by the evidence. On a review of the evidence upon a motion for a new trial the trial court became convinced that the question was one for the jury, and accordingly granted a new trial. The plaintiff, who lived in Wisconsin, was a stranger in the vicinity, and unacquainted with the street car lines between St. Paul and Minneapolis. On the 12th day of June, 1892, in company with a friend, he boarded a street car running between the cities named, early in the evening of that day. On the way a severe storm of wind and rain reached a point on Washington avenue in the city of Minneapolis, between Second and Third streets, where

the car was stopped by the storm. The electric current was turned off, and the lights went out. The motorman or driver notified the conductor that he could not go ahead, for the reason that he could not see on account of the storm, and that the hail and rain were driving in his eyes. The car was crowded and the plaintiff and his companion, who were standing up, exposed to the storm, thereupon left the car, and with an umbrella raised, started across the street. In doing so, they stepped upon a parallel track, and plaintiff was knocked down and injured by a car coming from an opposite direction, which he did not see or hear, on account of the storm and darkness. It also appears, according to his testimony, that he did not know where they were, nor that there was a double track on the line, nor see the track in question, which was covered with water at the time. We do not think his evidence in respect to his knowledge of the risk was necessarily incredible, under all the circumstances. The storm, darkness, the noise of the car he was on, and his position thereon, with a crowd might have prevented him from noticing the cars on the parallel track, or from knowing of the existence of the double track. Notwithstanding plaintiff's failure to watch out for another street car, the question of his contributory negligence was for the jury. *Shea v. St. Paul City Ry. Co.*, 50 Minn. 395 (52 N. W. Rep. 902).

2. The evidence tended to show that the car which struck and injured the plaintiff was running at a very high rate of speed—fifteen or twenty-five miles an hour. The jury might very properly find such rate of speed to be dangerous, and the question of defendant's negligence was very clearly for them. The storm and darkness imposed the additional duty of caution while proceeding on a street where pedestrians might be expected to be crossing at any time in the evening.

Order affirmed.

NOTE.—See notes to *Boerth v. West Side R. Co.*, post.

WITTE V. BROOKLYN CITY RAILWAY COMPANY.*City Court of Brooklyn, N. Y., General Term, June, 1893.*

(4 Misc. Rep. 286.)

ELECTRIC RAILWAY.—DUTY OF TRAVELER AND OF MOTORMAN.—COLLISION.

It is the duty of one driving with a vehicle upon the tracks of an electric street railway to turn off seasonably to avoid a car approaching from the rear; and of the motorman to exercise proper care to avoid collision. Questions of negligence and contributory negligence held properly submitted to the jury.

THE plaintiff was driving two horses attached to a brewery wagon. While in the act of getting off the track a hind wheel of the wagon was struck by an electric railway car which came up suddenly from behind, causing injuries, to recover for which the action was brought.

Appeal by defendant from judgment entered upon a verdict.

Jas. & T. H. Troy (Charles J. Patterson, of counsel),
for plaintiff (respondent).

Morris & Whitehouse, for defendant (appellant).

CLEMENT, Ch. J.: The counsel for the appellant seeks a reversal in this case only on two grounds: *First*, that the evidence showed contributory negligence on the part of plaintiff; *second*, that there was no proof of negligence of the defendant. The plaintiff drove a beer wagon in a southerly direction along the track of defendant on Third avenue in this city until he reached Thirty-second street, where he swung his wagon to the east, in order to get out of the track, and then turned to the west. The wagon was

nearly off the track when an electric car struck the hind wheel and overturned it.

This case was properly submitted to the jury. It was the duty of plaintiff to turn off seasonably to avoid the car approaching from the rear, and, while so doing, the motorman was bound to exercise proper care to avoid a collision with the wagon. Whether the plaintiff was guilty of contributory negligence, and whether the motorman was negligent, were questions of fact for the jury. *Quinn v. Atlantic Avenue R. Co.*, 12 N. Y. Supp. 223; affirmed, Court of Appeals, without opinion, 134 N. Y. 611.

Judgment and order denying new trial affirmed, without costs.

OSBORNE, J., concurs.

Judgment and order denying new trial affirmed.

NOTE.—See notes to *Boerth v. West Side R. Co.*, post.

ANNIE BENJAMIN V. HOLYOKE STREET RAILWAY COMPANY.

Supreme Judicial Court of Mass., Oct. 20, 1893.

(160 Mass. 2.

**ELECTRIC STREET RAILWAY.—FRIGHTENING HORSE.—NEGLIGENCE.—
CONTRIBUTORY NEGLIGENCE.—PLEADING.**

The use of streets for electric cars and that by the general public are concurrent; and those operating the cars are bound, in using the street, to regard its reasonable use by others.

Held, not improper for a jury to find negligence on the part of those in charge of an electric street car from the circumstance that when overtaking a frightened horse driven by a woman along side the track, they did not stop the car, but continued at full speed, sounding the gong, as a result of which the horse shied and an accident occurred.

The mere failure of a traveler to look for approaching electric cars, at a place other than a street crossing, will not bar a recovery in an action based on negligence of the street railway company.

Benjamin v. Railway Co.

A general averment of negligence in the running of an electric street car is sufficient to allow evidence of the injudicious sounding of the gong.

APPEAL from judgment of Superior Court, Hampden county, awarding damages to plaintiff for injuries caused by negligence of the defendant in operating its electric street railway. Facts stated in opinion.

A. L. Green, for the plaintiff.

W. H. Brooks, for the defendant.

ALLEN, J.: The case which the plaintiff's evidence tended to support was as follows: Appleton and Beech streets crossed each other at right angles. There was an electric street railway on Appleton street. The plaintiff was driving on Beech street towards Appleton street; saw a car pass; thought it would be safe to cross; drove on to Appleton street, as if to cross it, the road bed being 34 feet wide. As she got almost upon the railway track, another car was coming, her horse became frightened, she turned him so as to go along on Appleton street by the side of the track, the car came following on, the motorman was sounding the gong, and when the car overtook her, and was just along side, the gong was sounded again, the horse sprang to the side of the street, and the accident occurred. The view from Beech street of that part of Appleton street on which the car was coming was obscured by an orchard and a barn.

The defendant contends that there was no evidence of the plaintiff's due care. The first particular assigned is that the horse which she was driving was manifestly an improper one for her to undertake to manage. This, however, is for the jury, on all the evidence. The next particular assigned is that she failed to look to see if a car was coming; and a special instruction was asked, based on the assumption that she failed to look. This, also, was for the jury. The accident did not occur from a collision at the street crossing. The plaintiff had passed that point, and was proceeding on Appleton street. The court rightly refused to instruct the

jury that a mere failure to look would prevent her from recovering. This has been so held even in cases of collision. *Shapleigh v. Wyman*, 134 Mass. 118; *French v. Taunton Branch Railroad*, 116 Mass. 537. The question was left to the jury with proper instructions.

The defendant further contends that there was no evidence of its own negligence. But the jury might well find negligence on the defendant's part from the testimony tending to show that the car was not stopped, nor its speed slackened, and that the gong was sounded, while the plaintiff was in obvious difficulty from the fright of her horse. The defendant contends that it was not bound to stop its car, or to stop the noise of the gong. But the omission to do so, under the circumstances, might well be deemed to show carelessness. The use of the street for electric cars and by the general public was concurrent; and the defendant was bound, in using the street, to have reference to its reasonable use by others. *Commonwealth v. Temple*, 14 Gray, 60; *Driscoll v. West End Street Railway*, 159 Mass. 142.

It was not necessary specially to set forth in the declaration the injudicious sounding of the gong, as an element of negligence. Sounding the gong is an incident to the running of the car, and the general averment of negligence in the running of the car was sufficient to include it. *Eaton v. Fitchburg Railroad*, 129 Mass. 364.

The objections to the questions put to the doctor are not sufficiently serious to require discussion. There was no error in allowing them to be put.

Exceptions overruled.

NOTE.—See notes to *Boerth v. West Side R. Co.*, post.
This case is cited in *Ellis v. Lynn & Boston R. Co.*, post.

PIERRE MEISCH, Respondent, v. THE ROCHESTER ELECTRIC RAILWAY COMPANY, Appellant,

New York Supreme Court, General Term, Fifth Dept., Oct., 1898.

(78 Hun, 604.)

ELECTRIC RAILWAY.—KILLING DOG.—CONTRIBUTORY NEGLIGENCE.

For a motorman, seeing dogs on the track ahead of his car, and high banks of snow on either side so that the dogs could get off only at certain cuts in the snow, to run down and kill one of the dogs, making no effort at all to stop the car, which was going ten or twelve miles an hour, was clearly a wrongful and negligent act. Even if the dog was a trespasser the motorman had no right to run him down.

The employer of the owner of the dogs owned also the adjacent land, subject only to the rights of the public for purposes of travel. He doubtless had a right to use the road with the dogs for the purpose of guarding the premises; at any rate, the defendant could not complain that the question of contributory negligence was left to the jury.

Case of this series cited in opinion: *Bernhard v. Rochester, &c. Ry. Co.*, *ante*, p. 506.

APPEAL from judgment of Monroe County Court, entered upon a verdict obtained on appeal from the Municipal Court of Rochester, and from order of County Court, denying the motion for new trial upon the judge's minutes. Facts stated in opinion.

J. S. Thompson, for the appellant.

A. E. Sutherland, for the respondent.

DWIGHT, P. J.: The action was to recover damages for the alleged negligent killing of a valuable young dog. We think the judgment is right and should be affirmed. The facts which the evidence tended to establish and upon which the jury had a right to base their verdict were briefly as follows: The plaintiff was superintendent of the Holy

Sepulchre Cemetery, on the Boulevard or Charlotte road, extending north from Rochester, along and upon which the railroad of the defendant was constructed, and its electric cars were run. The plaintiff's house was near the north end of the cemetery property, which consisted of about 300 acres lying on both sides of the road. The plaintiff, having the charge and oversight of all this property, found it useful to keep one or more watch dogs on the premises, and at the time mentioned in the evidence he had two, one an old dog, which he had trained to patrol the premises several times a day, passing up and down the road for that purpose, and the other the dog in question. He was a very large and well-bred English mastiff, only eleven months old, and was accustomed to accompany the old dog in his rounds, and was thus, in the most effective way, becoming trained to perform the same duties. On the day of the accident the two dogs were returning together from the southerly portion of the property to the plaintiff's house and had taken to the railroad track for that purpose. It was in January and there was deep snow on the ground, some of which had been thrown from the track by the snow plow and lay piled up to the height of two feet on either side. A water tank stood about 1,000 feet south from the plaintiff's house, and at that point there were cross openings through the snow banks, but no others, going north, until the plaintiff's gate was reached. As the defendant's car No. 14 passed the water tank, going north on the afternoon in question, the two dogs were plainly to be seen about 325 feet ahead, running on the track between the banks of snow towards their home. The car was running at a speed of from ten to twelve miles an hour; the motorman struck his gong, but made no effort to check the speed of the car; the older dog leaped from the track, but the younger one failed to do so and was run down and killed just as he reached and was on the point of turning through the cut in the snow bank opposite his master's gate; he had run two-thirds the distance the car had done in the same time, and a very slight reduction in the speed of the latter at any

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time down to the last moment of the race would have enabled him to escape without injury.

Upon these facts, which, as we have said, were so well supported by the evidence that the jury had a right to accept them as the facts of the case, there can be no doubt of the plaintiff's right to recover so far as the question of the defendant's negligence was concerned. Even if the dog was a trespasser on the track, the motorman was not justified in running him down, but it was his duty, on discovering that there was danger of doing so, to slacken the speed of the car; and it was clearly a question for the jury whether, in the exercise of reasonable vigilance, he might have discovered the danger in time to avert it. *Watkins v. Atlantic Avenue R. R. Co.*, 20 Hun, 237; *Watson v. Broadway & Seventh Avenue R. R. Co.*, 6 N. Y. St. Rep. 538; S. C., 18 id. 1029; *Swift v. S. I. R. T. Co.*, 33 id. 604; *Bernhard v. Rochester Ry. Co.*, 51 id. 880.

It is doubtful whether there was any evidence in the case which tended to charge the plaintiff with contributory negligence in permitting the dogs to be at large in the highway. The employer of the plaintiff was the owner of the land on both sides of the highway, and of the fee in the highway itself, subject only to the easement of passage of the public, including the defendant, and his right to make use of the highway for the excursions of his dogs in the business of guarding the premises so exposed to trespassers can hardly be questioned. But it was at least a question for the jury whether he was guilty of any negligence in respect to the care of the dogs on the occasion in question.

These views, if correct, dispose of the defendant's exception to the denial of its motions for a nonsuit, and for the direction of a verdict.

The single exception taken by the defendant to any ruling on the admission of evidence is not discussed on the argument here, and it seems to be without merit. The same may be said of the defendant's exception to the refusal of the court to charge that no competent evidence had been

distance within which vehicles moving at lawful speed would endanger him. If obstacles temporarily intervene to prevent observation, he should wait until the required observation can be made.

Street cars propelled by electricity, and running along land burdened only with the easement of a public highway, cannot be run at a rate of speed incompatible with the lawful and customary use of the highway by others with reasonable safety.

ERROR to Supreme Court. Appeal by defendant below, from judgment on verdict at Essex Circuit.

Anthony Q. Keasbey and Edward Q. Keasbey, for the plaintiff in error.

Louis Hood and Samuel Kalisch, for the defendant in error.

The opinion of the court was delivered by **MAGIE, J.**:

[Discussion of general principles governing non-suits and direction of verdicts, omitted.]

The argument in behalf of the plaintiff in error is next addressed to an exception taken to the ruling of the trial judge upon a request to charge.

To make the request intelligible, it should be stated that the evidence of defendant in error in respect to the mode in which she received her injury was that she was struck and run over by a car of plaintiff in error, propelled by electricity, and running on the west bound or north street car track in Springfield avenue, in Newark; that, when struck, she was crossing the avenue from south to north on a crosswalk at the intersection of Prince street with the avenue; that an east bound car running on the south street car track had stopped upon the crossing, and she had waited until it passed, when she went on, "looking both sides;" that, not seeing any west bound car, she stepped on that track, and was immediately struck and run over. It appeared by the evidence of witnesses called by her that the east bound car stopped at the crossing and went on, and the west bound car passed it, running at great

speed, and without giving signals ; one witness estimated the speed at 15 miles an hour.

The request in question was as follows: "If the jury believe the account of the plaintiff and her witnesses as to the fact that one car stopped at Prince street and passed the other below that street, it was the duty of plaintiff to wait long enough before crossing to allow the down car to pass far enough for her to see whether another was coming; and if she neglected that duty she was guilty of contributory negligence, and cannot recover, although the jury may believe that the up car was going at an unusual rate of speed, the track being straight, and the car visible far enough to avoid it at any possible speed.

The judge declined to charge in that respect otherwise than he had charged, and this exception was taken.

The request is open to criticism as asserting a fact respecting the distance at which a car was visible, which was in dispute.

But it may be considered, however, as raising the question of the duty of the injured person under the circumstances above set out, and whether the request correctly states that duty.

It is first contended that the question of duty in this case is affected by the fact that defendant in error was crossing a highway along which cars propelled by electricity constantly ran. It is argued that the duty to take precaution against danger varies with the degree of peril ; that the lawful use of a highway by such cars has, by reason of their running at greater speed, created additional danger to others using the highway ; and that their duty in respect to such danger has thus been enhanced and enlarged. It is even insisted that the duty of persons traversing highways on which such cars run is like that imposed on persons passing along a highway where it is crossed at grade by a railroad operated by steam power.

It is not pretended, and the case does not show, that plaintiff in error has acquired by legislative grant any right to run its cars in the highway at any rate of speed. Such

a grant to use a rate of speed in highways which would be destructive of its customary use by others, and incompatible therewith, would not be within legislative competency, except on compensation made to the owners of the land traversed by the highway.

Public highways have been acquired by dedication or condemnation for the use of the public in passing and repassing. Up to very recent times the public have used the rights of passing and repassing on highways, on foot or on horseback, or in vehicles drawn by horses or other animals. When authority was granted to lay rails on highways, and to run thereon cars drawn by horses for the carriage of passengers, it was long questioned whether such a use of the highway did not impose an additional burden upon the land, and whether such a grant could be made without compensation. It was finally settled by the weight of authority that the use of the highway by such cars was only a modification of the original use to which it had been devoted, and that no additional burden was imposed by such grant. That doctrine was adopted in this state. *Citizens' Coach Co. v. Camden Horse Railway Co.*, 6 Stew. Eq. 267. But it must be conceded that a grant of a right to use the highway in a mode incompatible with its customary use by the public would impose an additional burden, and could not be made without compensation.

The public has acquired such rights in the use of highways as the owners of the lands traversed thereby have yielded or been deprived of, and it may not be restricted in the enjoyment of such rights by a use of the highway inconsistent and incompatible therewith, at least without legislative grant. Whether the public rights thus acquired may be thus diminished or destroyed by legislative grant when no compensation is made to landowners is not a question involved in this case, and no opinion is intended be expressed thereon.

As has been stated, no legislative grant in this case is shown. The contention of plaintiff in error rather takes this shape. It asserts that its cars, propelled by electricity,

are capable of being run at greater speed than other vehicles in the highway, and that the public convenience demands, for passengers carried in such cars, what is called "rapid transit;" and it draws the inference that its cars may therefore be run at such speed as will satisfy this public demand, and that other persons lawfully using the highway in the customary modes must govern themselves and use the highway accordingly. Judicial opinions have been cited to us which appear to support these extraordinary propositions. I am unable to subscribe to the notion which, carried to its logical conclusion, would permit this company and other companies running cars in public highways propelled by electricity, cables, etc., to run at any rate of speed which they may deem a demand, undefined and unrecognized by law, to require. The right to use the highways by such cars is not paramount to the rights of others in the customary use thereof. It must be used in a manner consistent with the rights of others. Such a paramount right as is contended for could not, in my judgment, be granted without compensation, and it surely cannot be acquired from a vague notion of a public demand for rapid transit.

There is no just analogy between the right of a street railway running such cars longitudinally along the highway and the right of a railroad company running its trains across a highway at grade. The latter company acquires by condemnation a right to run its tracks over the lands covered by the highway, and so burdens it with an additional easement. By legislative grant it uses the easement so acquired in the passage of trains run at great speed, and to a certain extent the public easement of passage is, at such crossing, modified. No grant for the acquisition and use of such additional easement has been made to the street railways, and in the absence of such grant no right to run cars at excessive rates of speed exists. Their only right in this respect is to run at such rate as will not interfere with the customary use of the highway by others of the public with safety.

Let us now consider whether the request under consideration correctly states the duty of defendant in error under the circumstances supposed.

The duty devolving on one using a highway for passage on foot varies with circumstances which are infinitely various. It may be of one degree when the highway is a quiet country road, and of another degree when it is the crowded street of a great city. It may differ at different hours of the day, with respect to different vehicles and the different rates of speed at which they are moving, and by reason of different opportunities of observation.

It is impossible, in my judgment, to classify these variant circumstances, and to lay down a precise rule as to the degree of care required in each class. In dealing with cases of this sort we must recur to the general rule which requires one, in exercising his lawful rights in a place where the exercise of like rights by others may put him in peril, to use such precaution and care for his safety as a reasonably prudent man would use under the circumstances.

From this rule it may be said, in general, that one who passes on foot along a sidewalk or footpath of a highway must use his powers of observation in respect to other passers thereon, and a reasonable judgment to avoid collision. In crossing the roadway a foot passenger must likewise use his powers of observation to discover approaching vehicles, and a like judgment when and how to cross without collision. In the latter case, doubtless, the degree of care required exceeds that required in the former case, not because the right of the foot passenger and the right of the driver of a vehicle differ, but because of the circumstances. The vehicle usually travels at a greater speed ; it cannot be so quickly stopped or diverted from its course ; a street car cannot deviate from its track ; while the passer on foot may quickly stop, turn aside, or even retrace his steps.

So, it may also be generally said that, if obstacles temporarily intervene to prevent observation, reasonable prudence would dictate delay until such observation as is requisite has been made.

But the request before us brings into question the extent to which one crossing the roadway on foot must extend his observation. Its claim is that such observation must be extended to any approaching car, no matter how distant. But this is obviously an exaggerated notion of the duty required. The most prudent man would never suppose himself required to thus observe. If such a rule of duty were adopted and practiced in a crowded city, the crossing of many streets would be barred to pedestrians for a great part of the time. The general rule to which we have recurrd does not justify this excessive view of the duty required. It will require one crossing the roadway on foot to extend his observation only to the distance within which vehicles proceeding at customary and reasonably safe speed would threaten his safety.

Under this rule the defendant in error should doubtless have waited until she could have observed any west bound car which, traveling at customary and reasonably safe speed, might imperil her in crossing. But she was not bound to delay until she could have seen any car on that track at any distance, coming with excessive and dangerous speed.

The charge was ample and correct on this subject, and the instruction asked for was properly refused.

The trial judge was further requested to charge that any one approaching a crossing must take notice of it, and exercise a reasonable measure of care to avoid contact with the moving car; and "if, by looking, the plaintiff could have seen and so avoided an approaching car, she cannot recover."

The request was not refused, but the trial judge said that he had "charged substantially according to his understanding of the law on that subject." An exception was then taken to the charge so far as it did not embrace "that secondary proposition."

Such an exception does not draw into review an omission in the charge. If counsel conceived that a pertinent pro-

position of law had been omitted, he should have specifically requested the desired instruction, and excepted to a refusal.

If the proposition in question had been requested and refused, I think there would have been no error. It is a proposition applicable to the crossing of the highway by the lines of a steam railroad. It is inapplicable to the crossing of a street railway, the cars on which must not exceed such speed as will permit the lawful, customary use of the highway by others with reasonable safety. Prudence doubtless requires one about to cross a railroad track to use his eyes to observe any approaching car within his vision. But, as has been shown, prudence does not require one crossing the track of a street railway to extend his observation to the whole line of track within his vision, but only to such distance as, assuming the required care in their management, approaching cars would imperil his crossing.

Other requests to charge, the judge declined to give otherwise than already given.

The charge correctly stated the law in the particulars covered by these requests, and there was no error in declining to repeat, in other language, the doctrines already laid down as law.

The remaining exceptions are to portions of the charge which, it is urged, tended to improperly affect the jury.

But the charge imposed on the jury, in the plainest terms, the duty of deciding the disputed questions of fact and settling the inferences to be drawn therefrom. When that is done, comments, or even expressions of opinion, by the judge upon the evidence, are not open to exception. *Engle v. State*, 21 Vroom. 272, and cases cited. I may add that, if the rule were different, the language of the charge is not, in my opinion, open to any criticism of this sort.

No error being found, the judgment below should be affirmed.

For affirmance.—THE CHANCELLOR, ABBETT, LIPPEN-

Ellis v. Railroad Co.

COTT, MAGIE, VAN SYCKEL, BOGBET, BROWN, CLEMENT,
SMITH, 9.

For reversal.—None.

NOTE.—See notes to *Beerth v. West Side R. Co.*, *post*.

ALEXANDER ELLIS V. LYNN AND BOSTON RAILROAD COM-
PANY.

Massachusetts Supreme Judicial Court, Jan. 4, 1894.

(160 Mass. 341.)

ELECTRIC STREET RAILWAY.—DUTY TO PUBLIC.—FRIGHTENING HORSES.

It is the duty of the motorman operating an electric car to keep watch as to whether by frightening horses or otherwise he is putting in danger persons lawfully using the street; and if he sees that a horse is frightened, it is his duty to so manage his car as to diminish the fright as much as possible.

Case of this series cited in opinion: *Benjamin v. Holyoke St. Ry.*, *ante*, p. 517.

APPEAL by defendant from judgment of Superior Court, Suffolk county. Facts stated in opinion.

T. P. Proctor and *B. W. Warren*, for the defendant.

A. A. Strout (*J. W. Johnson* with him), for the plaintiff.

KNOWLTON, J.: Although there was some conflict of evidence in this case, the jury may have found that the plaintiff, having no reason to think it unsafe to do so, drove down a street in the city of Lynn on which was an electric railway and there met one of the defendant's open electric cars filled with passengers, on which the motorman was continually sounding the gong; that his horse was frightened at the car and at the noise of the motor and of the

gong, and manifested its fear in such a way as to show the motorman that the plaintiff and his daughter who was riding with him were in great peril, and that the motorman, instead of stopping the car, or ceasing to sound the gong, kept on with the car and continued to make a loud clangor with the gong, so that the horse became unmanagable, broke the carriage, threw the plaintiff out, and thereby inflicted serious injuries upon him.

The defendant's requests for rulings go upon the theory that the manager of an electric railway car upon a street is never called upon to stop the car or to change his method of managing it to avoid any danger from the fright of horses other than the danger of collision with the car. These requests were founded on an erroneous view of the law. It is a well known fact that most horses are frightened at their first view of a moving electric car, especially if they encounter it in a quiet place away from the distracting noises of a busy city street. It is only by careful training, and a frequent repetition of the experience, that they acquire courage to meet and pass such a car on a narrow street without excitement. The rights of the driver of a horse and the manager of an electric car under such circumstances are equal. Each may use the street, and each must use it with a reasonable regard for the safety and convenience of the other. The motorman is supposed to know that his car is likely to frighten horses that are unaccustomed to the sight of such vehicles, while most horses are easily taught after a time to pass it without fear. It is his duty, if he sees a horse in the street before him that is greatly frightened at the car, so as to endanger his driver or other persons in the street, to do what he reasonably can in the management of his car to diminish the fright of the horse, and it is also his duty in running the car to look out and see whether, by frightening horses or otherwise, he is putting in peril other persons lawfully using the street on foot or with teams. In this way the convenience and safety of everybody can be promoted without serious detriment to anybody. Of course the owners and drivers of

horses are required at the same time to use care in proportion to the danger to which they are exposed. *Benjamin v. Holyoke Street Railway*, 160 Mass. 3.

These principles were adopted by the presiding justice for the guidance of the jury at the trial of this case, and the instructions given were correct. So far as the defendant's requests for instructions embody correct propositions of law, they were covered by the instructions given. The judge was not bound to tell the jury that certain facts of which there was evidence would or would not constitute negligence apart from other facts which were testified to.

The jury were rightly instructed to consider the question whether the motorman ought to have seen the frightened condition of the horse if he did not see it, and to treat his failure to see it, when he might have seen it by the exercise of due care, as negligence. There was ample evidence to warrant the verdict, and the bill of exceptions discloses no error in the proceedings.

Exceptions overruled.

NOTE.—See notes to *Beard v. West Side R. Co.*, post.

DAVID DAVIDSON, Plaintiff in Error, v. DENVER TRAMWAY
COMPANY, Defendant in Error.

Colorado Court of Appeals, Feb. 18, 1894.

(4 Col. App. 288.)

ELECTRIC STREET RAILWAY.—DUTY TO TRAVELERS.—COLLISION.—CON-
TRIBUTORY NEGLIGENCE.

While the preferential use of their track by electric railway companies closely approximates the right of exclusive use granted or conceded to steam railways, still the rule requiring a person approaching a steam railway to stop, look and listen for trains before crossing and charging him with contributory negligence for failure to do so, applies in only a limited sense as to electric street railways.

Nevertheless, held, that under the circumstances of the case at bar the plaintiff was guilty of contributory negligence for failure to take any precaution whatever when crossing an electric street railway in the middle of a block.

Cases of this series cited in opinion: *Carson v. Federal Street, &c. Ry. Co.*, ante, p. 470; *Ehrisman v. East Harrisburg, &c. Ry. Co.*, ante, p. 486; *Shea v. St. Paul City Ry. Co.*, ante, p. 481.

APPEAL from judgment of District Court, Arapahoe county, awarding damages to the plaintiff. Facts stated in opinion.

Feller & Dayton, for plaintiff in error.

James H. Brown and *Milton Smith*, for defendant in error.

BISSELL, P. J., delivered the opinion of the court: An electric car operated by the tramway company collided with the wagon in which Davidson and his wife were riding, and did considerable damage to their persons and property. Davidson brought suit, but at the conclusion of his proof he was non-suited, and has brought error to reverse the

judgment. He was evidently non-suited because of his negligence which contributed to the injury.

Only so much of the evidence will be stated as bears upon that single proposition, and is necessary to an easy apprehension of our conclusions respecting it. The tramway company operated an electric line out Broadway for several miles beyond the limits of Denver. That street runs due north and south, and at the point of the accident consists of a single track with turn-outs or switches to enable the cars to pass each other. Davidson had lived at Petersburg for nearly a year prior to the accident, and was accustomed to drive to town several times a week. The streets crossing Broadway run at right angles to it, and this was true of Myrtle street, along which Davidson drove eastwardly on the morning of the 10th of April, when he was hurt. In pursuing his journey, he crossed the railway track at the intersection of Myrtle and Broadway to the east side of the road, turned to the left and went north along the line to a point some two hundred and ten feet beyond Myrtle, where he attempted to cross the track to a store on the other side of the way. His course was some seven or eight feet distant from the track, and of course coincident with that of the car coming from the south which afterwards struck his vehicle. According to his testimony, when he crossed the track at Myrtle, he looked south and saw no car coming. As he turned and went north he saw a car on the switch about nine hundred feet from that point headed southward, and waiting for a car which was coming from the south headed in the opposite direction; but which, he states, he did not see. He noticed the car on the switch, and evidently knew it was waiting for the car bound north to pass, which of necessity was coming behind him, running in the same direction that he was traveling. At this part of Broadway the road is comparatively level, and, as Davidson testifies, any one could see southward from Myrtle street a distance of three quarters of a mile. There was a grocery store on the west side of Broadway, between Myrtle and the next street

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crossing Broadway to the north, at which Davidson and his wife were in the habit of trading. It would appear, although the evidence is not very clear on this subject, that travel was somewhat common across Broadway at that point, and that customers that drove on the easterly side of the road, at about the location of the grocery, crossed the track to do their trading. Davidson and his wife both testified that such was their custom, and on this particular morning they started to cross the track and were run into by the car. They were driving in an open wagon between eight and nine o'clock in the morning, and neither was bundled up, nor had their ears covered. The morning was fair although somewhat cloudy; but there was nothing in the conditions of the weather to prevent these persons from either hearing or seeing the approaching car. Davidson says that after he crossed the track at Myrtle, he noticed the car standing on the switch; but that when he turned to cross the road he neither listened nor looked back to discover whether a car was coming from the south. After they got on to the track, his wife looked, discovered the car almost on to them, when Davidson did the best he could to get out of the way, but failed, and was injured. One of his witnesses testified that the car was coming along at the rate of ten or twelve miles an hour, while according to Davidson his horse was being driven in a sharp walk or slow trot at the rate of four or four and a half miles an hour. This is only important as bearing upon the degree of watchfulness or care which Davidson used at the time.

The great development of rapid surface transportation, and the almost universal appropriation of the streets of the cities and the roads running therefrom to the suburbs by the various cable and electric systems, has resulted in the springing up of a very large and increasing class of suits for personal damages, and in the development of a new body of the law which has been formed by the application of old rules to the new conditions, and the evolution of some relatively modern doctrines applicable to the use of streets and highways. The roads have always been the

King's highway, along which all persons had an equal right to pass. The learning which has been expended in the settlement of the rights of the pedestrian, and the driver of a vehicle, and their relative duties and obligations when passing or meeting upon the highway, has developed a most interesting branch of the law. In this action we are concerned with but a very slight element of it. The difference between the rights of steam railways and street railways is marked and unquestioned, although in many respects somewhat similar. The distinguishing difference is in the exclusiveness of the right of a steam railway company to occupy its track as against all other persons or modes of locomotion. The street railway, however, occupies the surface of the highway subject to the common use not only of the balance of the road, but also of that part covered with the tracks by either the pedestrian or the driver of a vehicle. The cases are not entirely agreed in their description of the easement enjoyed by the transportation company. It is always conceded not to be exclusive, but is generally held to be superior. Whether or not this is an accurate description of their right, their privilege is undoubtedly a preferential one as against all other modes of locomotion along that part of the highway occupied by the track. This concession is absolutely essential to the preservation of the rights conferred by their franchise, the development of the objects for which they were organized, and for the great benefit of a very large proportion of the population of the cities which must make use of it for the purposes of business and travel. It is evident from the later decisions that the preferential use of the lines of their track by cable and electric companies closely proximates the right of exclusive use granted or conceded to steam railways. All the courts agree, however, that there still remains with the pedestrian, the users of vehicles and of horses, the old right which they always enjoyed to use all of the King's highway at their pleasure and for their convenience. It is only insisted that they shall yield the track to the railway company,

and shall keep out of the way of the cars so far as may be possible, barring the accidents of sudden emergency. Neither of the rules which has been the outgrowth of the litigation springing from accidents happening along the line of steam railways has been, save in a limited manner, applied to these rapid modes of transit by cable and electricity. It is pretty universally adjudged that before one can cross a steam railway, he is bound to stop, look and listen to discover the approach of a train before he shall be permitted to cross the track and escape the responsibility of his own negligence if he fails in any of these particulars. While in a sense, and a very limited one at that, this rule has been applied to the acts of the pedestrian or the driver of a vehicle in crossing the transportation company's line, the difference between the steam railway and the electric or cable line must be borne in mind. The absence of the exclusive right to the occupancy of the street compels the distinction. The grant of a franchise to the company in no manner takes away from the other users of the highway their right to its entire occupation, save that their right to enjoy is limited by the contractual right of the transportation company, and its preferential privilege in the use of that part of the road occupied by the tracks. If the pedestrian or the driver of a vehicle were compelled to stop, look and listen before he crossed the tracks, it would be an unnecessary and an unusual burden and restriction upon his common law right to use the King's highway which still remains with him. Notwithstanding this exception, neither the pedestrian nor the driver of a vehicle may undertake to cross a track heedlessly and recklessly, and without the exercise of the greater care which he is bound to use in crossing the tracks of a company lawfully using powerful, rapid and dangerous modes of locomotion. There is some difference among the authorities in their expression of this principle. Pennsylvania lays it down as an absolute rule, that if one heedlessly makes the attempt to cross such a track, he is guilty of negligence *per se* which will absolutely bar his right of recovery. Other

States hold the failure to look to be proof of negligence which will bar the recovery, where there is nothing in the case which would in any manner qualify this proof of negligence and leave a fairly debatable question open for the consideration of the jury. Others again, as in Minnesota, say that there is no hard and fast rule in a case of this description, and that a failure to look would not, as a matter of law, and regardless of circumstances, be treated as negligence. This case does not compel us to definitely and absolutely express our notions respecting this matter, although it is very difficult to imagine circumstances which would excuse the injured party for his neglect to use his eyes as well as his ears to guard against an accident occurring while he is crossing the track. *Ward v. Rochester Electric R'way Co.*, N. Y. Supp., vol. 17, p. 427; *Carson v. Federal Street, etc., R'way Co.*, 147 Pa. St. 219; *Ehrisman v. Harrisburgh R'way Co.*, 150 Pa. St. 180; *Wood v. The Detroit City R'way Co.*, 52 Mich. 402; *McLain v. The Brooklyn City R'way Co.*, 116 N. Y. 459; *Dolan v. The Delaware & Hudson Canal Co.*, 71 N. Y. 285; *Pennsylvania R. Co. v. Righter*, 42 N. J. Law, 181; *Adolph v. The Central Park N. E. R'way Co.*, 76 N. Y. 530; *Shea v. The St. Paul City R'way Co.*, 52 N. West. 903; *Meyer v. The Lindell R'way Co.*, 6 Mo. App. 27; *Sheets v. The Connolly Street R'way Co.*, 24 Atlantic, 483; Beach on Contributory Negligence, sections 251-289 *et seq.*; Booth on Street Railway Law, section 316.

These cases all unite in holding that a person must use his senses in order to prevent accident and escape injury. If the proof shows that he failed to do either, and that this contributed directly to the injury, the law will be applied to the facts and the plaintiff will not be permitted to recover. The plaintiff's right to go to a jury upon the questions of fact concerning his negligence depends so much upon the question whether the matter is a debatable one, and whether the proof leaves room for different inferences in men's minds respecting his conduct, that he cannot complain of a non-suit when he has been guilty of what the law

says is negligence on his part. In a case of that sort there is nothing for a jury to determine and the court applies the law to the facts. The present case comes directly within the rule. Confessedly the plaintiff did not look to the south along which he was advised the car was approaching; and evidently neither he nor his wife used their ears or any of their senses to protect themselves against danger. Davidson saw the car standing on the switch a few hundred feet distant waiting for one approaching from the south. He had driven up and down the line of the road almost daily for ten months, and knew that these cars, propelled with great force and much speed, went along the line at frequent and almost regular intervals. These circumstances and this knowledge advised him of the necessity to be on the alert and on the lookout to see if the car was coming before he crossed the track. Neither he nor his wife looked, and apparently neither of them heeded the sound of the approaching car. He turned upon the track without consideration, and a collision resulted from his negligence. It is not easy to reconcile his statement of his conduct at Myrtle street with reference to looking up and down the track with the evidence in the case. The proof was that the car was running at a speed of ten or twelve miles an hour; that from Myrtle street, southward, he could see three-quarters of a mile; that he was going at the rate of four or four and a half miles an hour, and went from where he crossed at Myrtle street to a point some two hundred and ten feet distant, where he attempted to cross to the grocery store, whither he was journeying. Either he was mistaken in regard to the fact concerning the approach of the car or else he was mistaken in saying that he looked. At the speed at which the car was traveling when he crossed Myrtle street, if it was not in sight for a distance of three-quarters of a mile, the car would not have reached the point of accident within three minutes, while he would travel the distance between Myrtle and the point of crossing in about thirty-five seconds. This fact very greatly disturbs our confidence in the accuracy of his statement, that

he looked southward along the line of the track when he crossed at Myrtle. This might not be conclusive, though it bears strongly upon the question whether he was reasonably attentive and prudent in his conduct. The railroad company cannot be chargeable with negligence for failing to slacken the speed of their car as they approached the crossing, for the driver was pursuing the same direction in which the car was going, and it is not to be supposed that the motorman could reasonably be expected to anticipate that the driver would change direction and cross in the middle of a block immediately in front of an approaching car. Davidson did not look, and apparently did not use his ears, and crossing the track under such circumstances, his act must be deemed a negligent one, which contributed to the injury, and as a matter of law bars his recovery.

The non suit was right, and the judgment will be affirmed.

Affirmed.

NOTE.— This case is cited in the next following.
See notes to *Beerth v. West Side R. Co.*, post.

**GRANVILLE J. PIPER, Plaintiff in Error, v. PUEBLO CITY
RAILWAY COMPANY, Defendant in Error.**

Colorado Court of Appeals, March 12, 1894.

(4 Col. App. 424.)

ELECTRIC STREET RAILWAY.—DUTY TO TRAVELERS.—PLEADING.

A complaint which alleges that when the plaintiff started to cross an electric street railway track he saw a car standing still, with neither conductor nor motorman upon it; that while he was upon the track, very near the car, it was suddenly started, and collided with and injured his wagon; and that he was free from contributory negligence, states a cause of action and is not demurrable.

Case of this series cited in opinion: *Davidson v. Denver Tramway Co.*, ante, p. 541.

APPEAL by plaintiff from judgment of District Court, Pueblo county. On demurrer to complaint. Facts stated in opinion.

D. McCaskill, for plaintiff in error.

No appearance for defendant in error.

BISSELL, P. J., delivered the opinion of the court: Piper sued the Pueblo City Railway Company for the damages caused by the operation of one of the company's cars. His complaint was demurred to on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained; he elected to abide by the pleading and brought the case here. The only question is whether he set up enough to entitle him to make the proof necessary to maintain his suit. We have been unable to discover any valid reason for the court's judgment. We were not aided in our investigation by any brief on behalf

of the railway company, and are unable to state the theory of their contention. We do not deem it necessary to set out the complaint. A simple statement of the general allegations of the pleading will suffice to illustrate our position. The complaint is not very artistically drawn, and is put in the form of two counts instead of one, though they both state the same identical cause of action. The only difference between the two counts is that in one the company is alleged to have negligently operated the car; and in the other, to have been negligent in the hiring of unskilled and improper persons to work it. Of course, it makes but little difference what constituted the negligence of the company so long as the accident resulted from the want of care. In general, the plaintiff stated the incorporation of the railway company, and its operation of a system of street cars propelled by electricity in the city of Pueblo. He averred that while he was driving along one of the streets in the city, he started to cross the track in front of a car which at that time was standing motionless a little off the crossing. He drove on to the track very close to it, At this time, neither the motorman nor conductor was on the car. While he was in the act of crossing, they suddenly started the car and recklessly ran it into his wagon, whereby his property was much damaged, and he seriously injured. He not only averred that he was free from negligence at the time, but that fact is generally deducible from the statements of the transaction which are contained in his complaint. What he said concerning the negligence of the company, if proven on the trial as laid, would undoubtedly render that company responsible for the injuries. Much of the argument of the plaintiff in error has been devoted to a discussion of the correlative rights and responsibilities of street railway companies operating cars by electricity, and of the citizen who may at the time be either using the line of tracks or crossing them for legitimate purposes, and at proper times. It would be inexpedient to attempt to lay down the law by which the rights of these parties must be determined, because the facts which

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are always an essential premise, are not before us. The subject has recently received considerable consideration in the case of *Davidson v. The Denver Tramway Company*, 4 Col. App. 283. So far as we are now able to see, that decision will guide the court in the trial of this cause. The judgment sustaining the demurrer was clearly erroneous, and it must be reversed.

Reversed.

NOTE.—See note to next case.

H. J. BOERTH, Appellant, v. WEST SIDE RAILROAD COMPANY, Respondent.

Wisconsin Supreme Court, March 16, 1894.

(87 Wis. 288.)

ELECTRIC STREET RAILWAY.—DUTY TO TRAVELERS.—COLLISION.—CONTRIBUTORY NEGLIGENCE.

It is contributory negligence which will bar a recovery for a person to approach an electric street railway seated so far back in his wagon that by reason of the side covering thereof he cannot see an approaching car or hear the gong upon it.

APPEAL by plaintiff from judgment of Circuit Court, Milwaukee county.

This action is to recover for damage to the plaintiff's horses, harness, wagon, and load of pies therein, by reason of being struck by an electric car of the defendant at the junction of Grand avenue and Eighth street, in Milwaukee, September 15, 1891. The defense is a general denial and contributory negligence. At the close of the trial, the court directed a verdict in favor of the defendant. From the judgment entered thereon, the plaintiff brings this appeal.

Fiebing & Killilea, for appellant.

Danforth Becker, Charles N. Gregory and F. B. Myers,
for respondent.

CASSODAY, J.: The evidence on the part of the plaintiff is to the effect that the wagon in question was covered with wood on the top and on both sides; that the only person on the wagon at the time of the injury was the plaintiff's driver; that in driving he sat about two feet back from the front of such covering, where he could not see out on either side; that about eight o'clock on the morning in question he drove north on Eighth street until he came to Grand avenue; that while in the act of crossing that avenue, with the horses on a walk, the defendant's electric car came from the west on the avenue, and struck the hind end of the wagon, and caused the damage complained of. The driver frankly admits that he did not see the car until after the collision; and that he could not see by reason of his being seated so far back behind the side covering; and that he heard no bell or alarm of any kind. If such evidence was true, then the defendant was guilty of negligence, and the plaintiff, by his driver, was guilty of contributory negligence which would bar a recovery.

The evidence on the part of the defendant is to the effect that the wagon in question was at the time being driven on the southerly side of the avenue, from Ninth street to Eighth street, by the side of the car, or a little ahead of it; that upon reaching Eighth street the plaintiff's team suddenly turned north on Eighth street, immediately in front of the car, and had nearly crossed the railroad track when the wagon was struck, as mentioned. The evidence seems to be overwhelming that the bell was repeatedly sounded while the car was going from Ninth to Eighth streets. If such were the facts, then there was no negligence on the part of the defendant, but there was gross negligence and carelessness on the part of the plaintiff.

Upon the admitted facts, there is no view of the case which would authorize a recovery.

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By the Court: The judgment of the Circuit Court is affirmed.

NOTE 1.—In the twenty-two cases preceding this note the duty of electric street railway companies to the general traveling public was the subject of consideration. In two of the cases the injury was due to the frightening of horses; in all the others, to collision of electric street cars with persons or property.

The following are memoranda of additional cases which it has not seemed best to reprint in full:

Thomas Glazebrook v. West End St. Ry. Co., Mass. Sup. Jud. Court, Nov. 29, 1893 (160 Mass. 240). Action for injuries to a person who, while driving with one wheel in the track, was collided with by an electric car. Held, that the motorman had a right to assume that the plaintiff would turn out in time to avoid the collision; but when he became aware that he was not going to turn out, it was the duty of the motorman to do what he reasonably could to avoid collision in default of which even if the plaintiff had no right to be where he was but was not guilty of negligence, he might recover.

Gibbons v. Wilkesbarre, &c. Co., Penn. Sup. Court, May 1, 1893 (155 Pa. 379). In an action for damages for killing a horse by collision with an electric car, held not error to charge the jury that it was not *per se* negligence to drive on a street in a narrow space between the track and a retaining wall, although the track was used by an electric railway causing noise calculated to frighten horses. Also held that in view of the narrowness of the space for vehicles and the rapid rate of speed of the cars, it was the duty of conductors to stop or slow up their cars when they saw, or with reasonable diligence should have seen, that horses were frightened.

In *Howard H. Chapman v. Zanesville St. Ry. Co.*, Muskingum Co. (Ohio) Com. Pleas, 1892 (27 W. Bul. 70), the following is a portion of the concluding part and gist of the opinion:

"I concur that it cannot be maintained that, as matter of law, one in charge of an electric car is bound to stop his car simply because a horse that is being driven on the same street has become frightened at the appearance and noise of the car; on the contrary, he may proceed, at the usual speed and with the usual noise. In doing this, he would not be negligent, and would not invade any right of the driver of the horse. But if the circumstances were such that failure to stop the car would show a wanton or wilful disregard for the safety of the driver of the horse, so that the continued movement of the car could be attributed only to wantonness or malice, and not to discharge of duty under his employment, he would then be negligent, and for such negligence there would be a liability of the company."

In *Kestner v. Pittsburg & Birmingham Traction Co.*, Pa. Sup. Court, Nov. 13, 1893 (27 Atl. Rep. 1048), the court say: "So long as a common user

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of streets exists in the public, it is the duty of street railway companies to exercise such watchful care as will prevent accidents or injuries to persons who, without negligence on their own part, may not at the moment be able to get out of the way of a passing car. The degree of care to be exercised must necessarily vary with the circumstances of each case."

Accordingly held, that it appearing that the plaintiff had his wagon in a place so narrow that it was difficult for cars to pass teams; that seeing the car approaching, he signalled the motorman to stop, and was in the act of unhitching the horse to get him out of the way of the car, when the car struck the wagon, frightening the horse and causing the injury complained of,—that there was sufficient evidence of defendant's negligence to warrant submitting the case to the jury.

In *Christensen v. Union Trunk Line*, Washington Supreme Court, March 9, 1893 (32 Pac. R. 1018), held that for a driver to go with his wagon upon the track of an electric railway without looking for an approaching car was contributory negligence which would bar recovery for injury caused by collision.

In *Haney v. Pittsburg, &c. Traction Co.*, Pa. Supreme Court, Dec. 30, 1893 (28 Atl. R. 285), it appeared that the plaintiff, driving a heavy load, and seeing an electric car coming upon the track which he was about to cross, attempted to cross ahead of the car and was injured. Held, that this alone would be contributory negligence. But there being also evidence that the defendant's watchman signalled him to cross, held that the question was properly submitted to the jury whether the plaintiff, though signalled, acted as a prudent man in attempting to cross, under the circumstances.

In *Driscoll v. West End St. Ry. Co.*, Mass. Sup. Jud. Court, May 19, 1893 (34 N. E. Rep. 171), an action for collision of an electric street car with a wagon, held that the questions of negligence and contributory negligence were properly submitted to the jury.

NOTE 2.—The duties of those operating electric street railways, toward, first, passengers upon their cars, and second, the public using the streets, sprang into such sudden prominence during the short period of time covered by this volume, that it may be useful to add a brief abstract of the principles decided in the foregoing cases upon those subjects.

DUTY TO PASSENGERS.—The following decisions relate to the general duty of companies toward their passengers: They are bound to greater diligence than ever attended the use of horse cars. *Cogswell v. West End, &c. Elec. Ry. Co.*, Wash., ante, p. 412. Bound to use extraordinary care to guard passengers against danger. *Denver Tramway Co. v. Reid*, Col., ante, p. 332. Conductor not bound, in absence of special danger, to assist able-bodied passengers to alight. *James v. Duluth St. Ry. Co.*, Minn., ante, p. 462, note.

The following relate to the use of barriers to prevent passengers from boarding or alighting on the side of the car next to the parallel track: Omission to use the barriers upon a car provided with them, and upon which their use is customary, is an invitation to passengers to board and

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alight on the side next to the other track. *Gaffney v. Brooklyn City Ry. Co.*, N. Y., *ante*, p. 454. In similar case, question of negligence proper for the jury, although it may not be negligence to provide no barriers. *Augusta Ry. Co. v. Glover*, Ga., *ante*, p. 433.

In the following cases passengers were injured by electric shock: A company having means of ascertaining that electricity is escaping from the motor car to the trailer is chargeable with knowledge that the platform rails are liable to become charged. *Burt v. Douglas Co. St. Ry. Co.*, Wis., *ante*, p. 329. Proof of injury by shock to passenger coming in contact with part of car is *prima facie*, if not conclusive, proof of negligence. *Denver Tramway Co. v. Reid*, Col., *ante*, p. 332.

The following relate to injuries at stations: To suddenly start a car while a passenger is in the act of boarding it is negligence. *Pfeffer v. Buffalo Ry. Co.*, N. Y., *ante*, p. 439; *Joliet St. Ry. Co. v. Duggan*, Ill., *ante*, p. 409. It is the duty of those in charge of a car, when stopping at a usual station, to wait until all persons desiring to board can do so safely; this duty is not limited to the person who hails the car. *Joliet St. Ry. Co. v. Duggan*, Ill., *ante*, p. 409. It is not negligence to start a car after waiting a reasonable time at the station, and there is no liability to a passenger who attempts to alight after the car has started, the conductor having no notice of such intent. *Augusta St. Ry. Co. v. Glover*, Ga., *ante*, p. 433; *Gilbert v. West End St. Ry. Co.*, Mass., *ante*, p. 456. To slow up at signal, and suddenly start when person about to board, and seeing the peril to make no effort to stop the car, is gross negligence. *Cent. Pass. Ry. Co. v. Rose*, Ky., *ante*, p. 429. A person ceases to be a passenger the moment he steps from the car. *Creamer v. West End St. Ry. Co.*, Mass., *ante*, p. 476.

In *Sears v. Seattle, &c. Ry. Co.*, Wash., *ante*, p. 423, held that a passenger injured because of a collision due to negligence of the motorman may recover of the company.

In the following cases the question of contributory negligence on the part of passengers is discussed: It is contributory negligence as matter of law to voluntarily and unnecessarily stand upon the steps of an electric car while going at the rate of six miles an hour. *Tanner v. Buffalo Ry. Co.*, N. Y., *ante*, p. 447. It is as matter of law not contributory negligence for a person put in position of peril by the sudden starting of a car to jump from the car after it starts, if a person of ordinary prudence would have done the same. *Piper v. Minneapolis St. Ry. Co.*, Minn., *ante*, p. 461, note.

Held not contributory negligence as matter of law: To attempt to board a car while in motion. *Corlin v. West End St. Ry. Co.*, Mass., *ante*, p. 406; *Citizens' St. Ry. Co. v. Spahr*, Ind., *ante*, p. 416; *Cent. Pass. Ry. Co. v. Rose*, Ky., *ante*, p. 429. But see *contra*, *Joliet St. Ry. Co. v. Duggan*, Ill., *ante*, p. 409. To ride on running board, under given circumstances. *Cogswell v. West St., &c. Ry. Co.*, Wash., *ante*, p. 413; *Elliott v. Newport St. R. Co.*, R. I., *ante*, p. 449. To attempt to board car by front platform. *Pfeffer v. Buffalo Ry. Co.*, N. Y., *ante*, p. 439. To stand on platform. *Marion St. Ry. Co. v. Shaffer*, Ind., *ante*, p. 453. To pass from one car to another when in motion, as to injuries from shock. *Burt v. Douglas*

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Co. St. Ry. Co., Wis., *ante*, p. 329. To attempt, with something in each hand, to board car while stopping but before completely stopped. *White v. Atlanta Consol. Street Ry. Co.*, Ga., *ante*, p. 462, note.

DUTY TO TRAVELERS.—The following adjudications relate to reciprocal rights and duties:

An electric street railway has only an easement in the street, in common with the traveling public. *Rascher v. East Detroit, &c. Ry. Co.*, Mich., *ante*, p. 473; *Benjamin v. Holyoke Street Ry. Co.*, Mass., *ante*, p. 517. Though its rights are in some respects superior. *Gilmore v. Federal Street, &c., Ry. Co.*, Pa., *ante*, p. 490. At places other than street crossings it has a paramount but not exclusive right of way. *Bernhard v. Rochester Ry. Co.*, N. Y., *ante*, p. 506. Approximates exclusive use. *Davidson v. Denver Tramway Co.*, Col., *ante*, p. 584. Has no paramount right of way at street crossings. *Bernhard v. Rochester St. Ry. Co.*, N. Y., *ante*, p. 506; *Watson v. Minneapolis St. Ry. Co.*, Minn., *ante*, p. 510. At crossing, motormen should exercise as much care as driver of vehicle. *Watson v. Minneapolis St. Ry. Co.*, Minn., *ante*, p. 510. The degree of care of both motorman and traveler is greater in case of electric cars than of horse cars. *Hickman v. Union Depot Ry. Co.*, Mo., *ante*, p. 463. Or of ordinary vehicle, especially as to those managing a car. *Rascher v. East Detroit, &c. Ry. Co.*, Mich., *ante*, p. 473. There is a reciprocal duty of the drivers of vehicles and of motormen to avoid collision; travelers should get off the track to let cars pass, and motormen should not carelessly run travelers down. *Hickman v. Union Depot Ry. Co.*, *ante*, p. 463; *Bernhard v. Rochester Ry. Co.*, N. Y., *ante*, p. 463; *Witte v. Brooklyn City Ry. Co.*, N. Y., *ante*, p. 516.

The following duties have been held, in various cases, to be incumbent upon those in charge of electric cars: For the motorman to do all he reasonably can to avoid collision with vehicles upon the track in front of the car (*Glazebrook v. West End St. Ry. Co.*, Mass., *ante*, p. 546, note), and to warn persons ahead of car by gong or otherwise. *Cent. Pass. Ry. Co. v. Chatterton*, Ky., *ante*, p. 501. Seeing wagon crossing track ahead of car, should slow up to enable it to pass in safety. *Bernhard v. Rochester Ry. Co.*, N. Y., *ante*, p. 506. Duty to exercise reasonable care to avoid injury to person or vehicle to enable it to get out of the way at once. *Gilmore v. Federal St. &c. Ry. Co.*, Pa., *ante*, p. 490; *Will v. West Side Ry. Co.*, Wis., *ante*, p. 494; *Kestner v. Pittsburg, &c. Co.*, Pa., *ante*, p. 546, note. Duty to slow up when he sees or with reasonable diligence should see that horses are frightened. *Ellis v. Lynn & Boston R. Co.*, Mass., *ante*, p. 531; *Gibbons v. Wilkesbarre, &c. Co.*, Pa., *ante*, p. 546, note. Contra, in absence of wantonness or malice. *Chapman v. Zanesville St. Ry. Co.*, Wis., *ante*, p. 546, note. Electric cars should be lighted in the night time. *Rascher v. East Detroit, &c. Ry. Co.*, Mich., *ante*, p. 473.

The following acts or omissions have been held to be negligent: To fail to ring bell when approaching street crossing. *Hickman v. Union Depot R. Co.*, Mo., *ante*, p. 463. To suddenly start car, which had been at rest, and run down wagon on track. *Piper v. Pueblo City Ry. Co.*, Col., *ante*,

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p. 542. When overtaking frightened horse driven by woman, to continue at full speed, sounding the gong. *Benjamin v. Holyoke St. Ry. Co.*, Mass., ante, p. 517. To run down and kill a dog, making no attempt to stop the car, although the dog was running between high banks of snow and almost reached a cut through which he was seeking to escape. *Meisch v. Rochester Ry. Co.*, N. Y., ante, p. 520. To run at a speed incompatible with the safe use of the highway by the public. *Newark Pass. Ry. Co. v. Block*, N. J., ante, p. 528. Or faster than allowed by ordinance. *Hickman v. Union Depot R. Co.*, Mo., ante, p. 463. To run through a narrow and unlighted alley on a dark night so rapidly that the car can not be stopped within the distance penetrated by the head light. *Gilmore v. Federal St. &c. Ry. Co.*, Pa., ante, p. 490. To run at high speed through a cut made by the company and between piles of dirt left by it. *Greeley v. Federal St. &c. Ry. Co.*, Pa., ante, p. 492. To run at high speed over a crossing, in much traveled streets, motorman not on the lookout, and the car not under his control, and he not using proper means to stop it. *Watson v. Minneapolis St. Ry. Co.*, Minn., ante, p. 510. Steep grade, narrow and busy street, obstructed view, high rate of speed, insufficient signal. *Shea v. St. Paul City Ry. Co.*, Minn., ante, p. 481. Proper for jury to find negligence when car running 15 to 25 miles an hour. *Boyer v. St. Paul City Ry. Co.*, Minn., ante, p. 514.

The following acts or omissions on the part of travelers have been held to bar recovery: To go upon the track of an electric railway, without looking for cars. *Christensen v. Union Trunk Line*, Wash., ante, p. 547, note; *Haney v. Pittsburg, &c. Traction Co.*, Pa., ante, p. 547, note. To cross electric railway in the middle of a block, taking no precaution whatever. *Davidson v. Denver Tramway Co.*, Col., ante, p. 534. To approach an electric railway, seated so far back in a covered wagon as to be unable to see an approaching car or hear its gong. *Boerth v. West Side St. Ry. Co.*, Wis., ante, p. 544. To leave an unguarded team on the track of an electric railway. *Gilmore v. Federal St. &c. Ry. Co.*, Pa., ante, p. 490; *Winter v. Same*, Pa., ante, p. 498. To drive on the track of an electric railway, leaving an unobstructed highway, and taking no precaution for safety. *Cent. Pass. Ry. Co. v. Chatterson*, Ky., ante, p. 501.

Held not contributory negligence as matter of law: To drive on narrow space beside the track of an electric street railway. *Gibbons v. Wilkes barre, &c. Ry. Co.*, Pa., ante, p. 546, note. See also, *Boyer v. St. Paul City R. Co.*, Minn., ante, p. 514; *Haney v. Pittsburg, &c. Co.*, Pa., ante, p. 547, note, the latter case being as to the effect of a signal from the watchman at a crossing, upon the question of contributory negligence.

The following cases discuss the question of contributory negligence of travelers about to cross electric street railways, with reference to the rule which requires travelers to stop, look both ways and listen, when about to cross a steam railroad: The rule applies in only a limited sense. *Davidson v. Denver Tramway Co.*, Col., ante, p. 534. Not applicable, as to looking both ways. *Shea v. St. Paul City Ry. Co.*, Minn., ante, p. 481. In a measure applicable; traveler must look, and if there is any obstruction must

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listen. *Ehrisman v. St. Paul City Ry. Co.*, Minn., *ante*, p. 486. Must look, but only such distance as car moving at lawful speed might reach him. *Newark, &c. Ry. Co. v. Block*, N. J., *ante*, p. 523. Traveler should both look and listen before going upon track. Failure to do so is contributory negligence unless those in charge of the car knew or in the exercise of reasonable diligence should have known of the peril in time to prevent the injury. *Hickman v. Union Depot R. Co.*, Mo., *ante*, p. 463. To listen alone, without looking, when looking would have avoided the injury, is gross negligence. *Carson v. Federal St., &c. Ry. Co.*, Pa., *ante*, p. 470. Mere failure to look held not to bar recovery. *Benjamin v. Holyoke St. Ry. Co.*, Mass., *ante*, p. 517.

**BADGER LUMBER COMPANY v. MARION WATER SUPPLY,
ELECTRIC LIGHT AND POWER COMPANY.**

Kansas Supreme Court, March 5, 1892.

(39 Pac. Rep. 476.)

ELECTRIC LIGHT APPLIANCES AS PROPERTY.—MECHANICS' LIEN.

(Head-note by the court):

An electric light and power company owned land, on which was a building and machinery for generating electricity, and it had a franchise from a city to use its streets for the erection of poles on which to stretch wires and suspend lamps to furnish light for the people of the city. Poles were purchased from plaintiff, planted in the streets of the city, wires and lamps were placed thereon, and all connected by the electric light wires with the machinery and premises of the company. *Held*, that the poles and wires were an appurtenance to the premises of the company, and that the plaintiff was entitled to a lien upon the same for the poles furnished.

[On motion for rehearing]:

An electric light company which has a franchise to occupy the streets of a city with its poles, wires and lamps, and is engaged in furnishing light to the people of the city, is not so distinctly public in its nature and operations as to exempt its property from the application of the mechanics' lien statute.

APPEAL by plaintiff from judgment of District Court, Marion county, awarding a personal judgment against de-

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fendant but refusing to enforce a mechanics' lien. Facts stated in opinion.

Keller & Dean, for plaintiff in error.

King & Kelley and *Winslow, McDuffie & Neal*, for defendants in error.

JOHNSTON, J.: The Badger Lumber Company brought this action to recover \$227.50, the value of 70 cedar poles sold by the lumber company to the Marion Water Supply, Electric Light & Power Company, which were used to support electric light wires and lamps, and were connected with the plant and property of the defendant; and the plaintiff asked to have the defendant's property and its appurtenances charged with a lien for the same. The cause was submitted to the court without a jury, upon the following agreed facts: "It is agreed that the defendant has erected a system of water-works and electric light plant and machinery necessary to operate the same on the real estate described in plaintiff's petition, and has put in the proper machinery for furnishing electric light for the city of Marion, and has a franchise from the city to use the streets of the city for the erecting of poles and stretching electric light wires thereon through the city; and that the defendant erected its poles and stretched its electric wires on the same over different portions of the city. That the plaintiff furnished poles for stretching the wires for the electric light, and that the defendant used the same in the streets of Marion, and stretched its electric wires upon the same, and hung its lamps thereon, and operated and used the same for the purpose of furnishing electric light for different portions of the city. That none of the material furnished by the plaintiff was actually placed upon the ground mentioned in plaintiff's petition, but that the poles so furnished were all used in the streets of the city of Marion, and were connected with the electric light machinery and water-works on defendant's premises by electric light wires used by the defendant for the transmission of electricity from its prem-

ises through the city. That the machinery of the electric light and water-works is all located on the same premises, in the same building, and run by the same engine ; but the dynamo for generating electricity, and its machinery, is so constructed and arranged that it can be used separate and apart from the water-works machinery, and that either the water-works or the electric light plant can be operated separately and independently from each other. And defendant has a franchise from the city to lay mains and pipes in the streets of the city, and is operating said system of water-works, and furnishing the inhabitants of the city with water by means of said system of water-works." The court awarded plaintiff a personal judgment against the defendant for the amount claimed, but refused to enforce a lien upon the real estate and appurtenances of the defendant, for the reason "that no part of the material for which plaintiff claims a lien was on the real estate of the defendant, or attached thereto in any manner except by the wires stretched from the poles of the defendant's electric light machinery situated on said real estate."

The sole question presented here is, do the poles and wires attached to the building and premises of the defendant constitute an appurtenance of the same within the meaning of the mechanics' lien law? The statute, as it existed prior to 1889, when this cause of action arose, provided that

Any mechanic or other person who shall, under contract with the owner of any tract or piece of land, * * * perform labor or furnish material for erecting, altering or repairing any building, or the appurtenances of any building, or any erection or improvement, or shall furnish or perform labor in the putting up of any fixture in or attachment to any such building or improvement, * * * or shall build a stone fence, or shall perform labor or furnish material for erecting, altering or repairing any fence, or any tract or piece of land, shall have a lien upon the whole piece or tract of land, the buildings and appurtenances, in the manner herein provided, etc.

As will be seen, the statute gives a lien for material furnished for a building or its appurtenances, and the same is

chargeable upon the land, building and appurtenances. If the poles and wires can be regarded as an appurtenance of the power house, the plaintiff acquired a lien and is entitled to enforce it against the property of the defendant. What, then, is an appurtenance? Bouvier's definition is: "Things belonging to another thing as principal, and which pass as incident to the principal thing. * * * Thus, if a house and lot be conveyed, everything passes which is necessary to the full enjoyment thereof, and which is in use as incident or appurtenant thereto." "The grant of a thing will include whatever the grantor had power to convey which is reasonably necessary to the enjoyment of the thing granted. Thus, the grant of a house with appurtenances passes a conduit by which water is conducted to it." 3 Washb. Real Prop. (3rd ed.), 419; *Farmer v. Water Co.*, 56 Cal. 11; *Meek v. Breckenridge*, 28 Ohio St. 642; 1 Amer. & Eng. Enc. Law, 641. Here the principal thing was the power house, and the poles and wires attached thereto were an incident to the power house and machinery. They were necessary to the enjoyment of the principal thing, and indispensable in the transmission of electricity and the lighting of the city. If a conveyance of the property of the company, with the appurtenances belonging, had been made by the defendant, we do not doubt that the poles and wires would have passed as appurtenant to the premises conveyed. The fact that the poles were planted in the streets of the city, the fee of which is in the public, will not change their character, or make them any the less an appurtenance to the premises of the electric light company. The city had granted the company a franchise to plant the poles upon the streets, and hence they are rightfully there; and there can be no question that they were owned by the electric light company. In *Redlon v. Barker*, 4 Kan. 445, it was held that an hotel sign, attached to a post planted in the street of a city, seven or eight feet from the front of the hotel and placed there as a permanent sign, was an appurtenance to the hotel; and where the hotel and premises were

conveyed with the appurtenances without reservation, such conveyance carried the sign and post. It was there urged that, as the owner of the hotel did not have the fee of the street on which the post and sign were standing, they could not be regarded as appurtenances to the premises; but it was said, as the sign and post were rightfully in the street, and necessary for the uses and purposes of the building to which they were incident, they remained the property of the owner of the hotel, and when he conveyed the hotel premises he parted with his title to the sign and post. In *Beatty v. Parker*, 141 Mass. 523 (6 N. E. Rep. 754), the plaintiff undertook to enforce a mechanics' lien for a drain pipe from the cellar of a house through the cellar wall, front yard and out into the street, to a connection with the sewer. The house was built upon a street of the city, and "the piping inside of the house and outside of it to the sewer was necessary to the use of the house and was included in the contract for building it. It extended 27 feet beyond the street line, and the fee of the street was not in the owner of the house. The court ruled that the contractor was entitled to a lien for the piping, and stated that it is immaterial whether it was inside or outside the walls of the house, or whether it was above ground or underground, or whether it extended one foot or thirty feet. It is immaterial also whether the fee of the land in the street was or was not in the owner of the lot. It must be assumed that the pipe was rightfully laid to the sewer, even if the fee of the street was not in the respondent.

The pipe did not become the property of the owner of the fee of the street, but belonged to the owner of the house, and he had an interest in the soil of the street to sustain his pipe, which would pass by a deed of the lot." See, also, *Philbrick v. Ewing*, 97 Mass. 134; *Factory v. Batchelder*, 3 N. H. 190; *Carpenter v. Leonard*, 5 Minn. 155 (Gil. 119.); *Milling Co. v. Remick*, 1 Or. 169; *Pullis v. Hoffman*, 28 Mo. App. 686; *McDermott v. Palmer*, 8 N. Y. 387; *Amis v. Louisa*, 9 Mo. 629; Phil. Mech. Liens, § 202; Kneel. Mech. Liens, § 83. The defendant in error principally relies upon

Parmelee v. Hambleton, 19 Ill. 615, to defeat the lien and sustain the judgment that was rendered. The court there held that a person who performed labor upon a vault under a sidewalk adjacent to a building was not entitled to a lien. The vault is there held to be an appurtenance to the building, but, as the appurtenance was in the street, and not upon the lot on which the building stood, the lien was denied. The case is not an authority here, and is based upon an Illinois statute, which provided that both the building and appurtenance should be upon the lot sought to be subjected to the lien. Our statute does not require that the appurtenance shall be upon the land, but authorizes a lien where the structure or improvement is appurtenant to the land or building. While the lien rests upon a statute, and the remedy must be confined within the terms of the statute, yet such provisions are to receive a liberal construction in the interest of justice, and we think the term "appurtenances," as used in the statute, fairly includes the poles and wires attached to the premises of the defendant, and that the plaintiff is entitled to the lien which he claimed. The judgment of the District Court will be reversed, and cause remanded with instructions to enter judgment in favor of the plaintiff. All the justices concurring.

UPON MOTION FOR REHEARING, June 11, 1892 (48 Kan. 187).

The opinion of the court was delivered by JOHNSTON, J.: On the first consideration of this case, it was decided that the poles and wires attached to an electric light plant and premises were appurtenances of the same, within the meaning of the mechanics' lien statute, and that persons who furnished labor or material for such appurtenances were entitled to a lien on the whole. Our attention is now called to another question, which was not considered, but which is fairly in the record, viz., is the property of an electric light company, having a franchise from the city to occupy its streets in the transmission of light to the inhabitants of a city, subject to a mechanics' lien?

It is contended that this corporation, like a railroad company, is an instrumentality of the public, authorized and

established for the convenience and benefit of the public, and that on the grounds of public policy and necessity its operation should not be disturbed or its property subjected to a lien at the instance of a laborer or material-man who has contributed to the building of its plant. If it were conceded that the railroad company and the electric light company are to be placed in the same class of corporations, we would still think that there was no public policy nor necessity which required an exemption of their property from the liability to the ordinary process of law or to a mechanics' lien.

The general rule is, that the public property of a municipal corporation is not subject to seizure and sale, and it is generally held that a mechanics' lien cannot be enforced against property which is not subject to sale on execution. The reason for this exemption is that such corporations are instrumentalities of the government itself, and the seizure and sale of the public property would interrupt and suspend the functions of government, and also that other provisions have been made by law for the collection and payment of public obligations. Corporations, however, such as the one claiming exemption here, although they serve the public convenience to some extent, are not organized merely for public advantage, but are operated largely for the private benefit of the incorporators. In this state such corporations may mortgage or sell their property, and the general rule is that property of a corporation which may be sold under a mortgage or specific lien given by the owner may be subjected to a mechanics' lien. If a corporation may, by its voluntary act, in creating a specific lien, subject its property to seizure and sale, it is difficult to find any substantial objection to allowing and enforcing the claim of a laborer or material-man against the same property under the mechanics' lien law.

In some of the States, notably Pennsylvania (*Foster v. Fowler*, 60 Pa. St. 27; *Guest v. Water Co.*, 21 Atl. Rep. 1001; see, also, *Graham v. Coal Road Co.*, 14 Bush. 425), it has been held under their statutes that a mechanics' lien

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will not attach to the property of *quasi*-public corporations. But our statute does not in terms or by implication warrant any such exemption. The language of the statute is broad and comprehensive and contains no suggestion of any exemption such as is claimed here. Under the terms of this statute, it has been held that a lien may be secured on a public school-house erected by a school district. *Wilson v. School District*, 17 Kas. 104; *School District v. Conrad*, 17 id. 522. Although some of the authorities hold in favor of the exemption because a judicial sale or the enforcement of a mechanic's lien would impair the usefulness of such corporations, and occasion public inconvenience, yet it has been well said that "the evil of withdrawing a vast and constantly increasing amount of the wealth of the country from the reach of creditors has been regarded as so real and serious that the courts have not given it their countenance or support; and at the present day the property of corporations other than municipal, though essential to the enjoyment of the corporate franchises, is almost universally treated as subject to execution." 1 Freem. Ex., § 126; see also, *Hill v. Railroad Co.*, 11 Wis. 214; *Railroad Co. v. Gilmore*, 37 N. H. 410; *Platt v. Railroad Co.*, 26 Conn. 544; *Coe v. Peacock*, 14 Ohio St. 187; *Lathrop v. Middleton*, 23 Cal. 257; *The State v. Rives*, 5 Ired. 307; *Board of Education v. Greenebaum*, 39 Ill. 609; *Arthur v. Bank*, 17 Miss. 394; *Storage Co. v. Southwark*, 105 Pa. St. 248; Phil. Mech. Liens, § 182.

The re-hearing will be denied.

All the justices concurring.

NOTE.—See note to next case.

**THE SHELBYVILLE WATER COMPANY V. THE PEOPLE, EX
REL. A. M. CRADDICK, Collector.**

Illinois Supreme Court, March 26, 1892.

(140 ILL 545.)

ELECTRIC LIGHT APPLIANCES AS PROPERTY.

Electric light wires, lamps and poles, connected with the machinery at the works of the company, are personal property for the purposes of taxation.

FACTS stated in opinion.

J. William Lloyd and *William C. Kelley*, for the appellant.

W. B. Townsend, State's attorney, and *Moulton, Chafee & Headen*, for the appellee.

Mr. Chief Justice MAGRUDER delivered the opinion of the court: This is an appeal from a judgment of the County Court of Shelby county, rendered at the May term, 1891, against delinquent lands, including certain lots and acre property belonging to the appellant company. The company appeared and filed objections, which were overruled, and exception was taken. Judgment was rendered against the lots of appellant in the original town of Shelbyville for a certain sum as personal property taxes, penalties and costs, and against ten acres of appellant in said county for a certain other sum as personal property taxes, penalties and costs. The two assessments of personal property taxes were made on the water mains and pipes and hydrants, and also upon the electric wires and lamps and poles, of the appellant, a part of which are in school district No. 2,

and a part in school district No. 1, the latter comprising the city of Shelbyville.

The appellant has erected upon its land, adjoining said city, a building and works, containing the necessary machinery for supplying the city with water, and for producing and furnishing electric lights. The water mains and electric wires are connected with the machinery. The mains are embedded in the earth, and extend from the works for some distance on the company's land, and thence through the streets of the city by permission of its authorities under ordinances passed for that purpose. Fifty hydrants, standing each about three feet above the ground, are fixed to and form a part of the mains. The water is drawn by the machinery from a river, and forced by the engines into the mains and pipes.

The wires, also, extend through the city from the dynamo and power engine in the building. Attached to them are thirty electric lamps. The wires and the poles on which they are strung beyond the land of appellant, are also upon the streets of the city by permission of the authorities, expressed in city ordinances.

The first objection is, that these mains and wires are a part of the realty, and were, therefore, improperly assessed as personalty. By express provision of our Revenue Act, gas mains and pipes, laid in roads, streets or alleys, are declared to be personal property, and are required to be listed and assessed as such. Rev. St., chap. 120, section 16; 2 Starr. & Cur., p. 2034. No such provision, however, exists in regard to water mains or electric poles and wires.

There are authorities which hold that the mains of a gas company are appurtenant to its lots, and are taxable as realty, unless it is otherwise provided by statute. *The Capital City Gas Light Co. v. The Charter Oak Ins. Co.*, 51 Iowa, 31; *Providence Gas Co. v. Thurber*, 2 R. I. 15. Under the doctrine of such authorities, it would seem that water mains and electric wires should be assessed as part of the realty, where there is no statutory provision directing otherwise; and, in Iowa, such water mains have

been held to be real estate, and treated as appurtenances to the water works. *Appeal of the Des Moines Water Company*, 48 Iowa, 324.

There are other authorities, however, which hold that gas mains in the streets of a city are personalty. In *The People v. Board of Assessors*, 39 N. Y. 81, it was said: "These mains, running under the streets of the city, not being erected upon or affixed to the relators' land, cannot be regarded as real estate, under the statute, for the purpose of taxation. The mains are not real estate, as that term is defined in the statute regulating the assessment of taxes, and I do not think they can be held as fixtures under the common doctrine upon that subject." In *Memphis Gas Light Co. v. The State*, 6 Cold. 310, the Supreme Court of Tennessee say: "It is insisted, that the pipes used for conveying the gas manufactured to the consumers and laid down, not upon the land of the company, but through and under the public streets of the city, are not a part of the manufacturing establishment. Pipes laid through the streets of the city, in the manner above mentioned, by permission of the corporate authorities, do not become the property of the city, or a part of the realty. They are personal property and the property of the company." So far as the application of this doctrine is concerned, there is no difference between the mains and the wires.

In this conflict of authority, we are inclined to hold that these mains and wires are personalty, as this view is in harmony with the spirit, if not the letter, of our statutes, and with the tone of our own decisions. In *Johnson, Collector, v. Roberts*, 112 Ill. 655, it was claimed that certain machinery in a building had been improperly assessed as personal property, because the engines and boilers were permanently attached to and were a part of the realty; and we then held, that although the engines and boilers would be regarded as permanent fixtures and a part of the realty at common law, and as between grantor and grantee, yet that the Legislature has the power to declare personal

property to be realty, and realty to be personal property, for the purposes of taxation ; that it had changed the rule so far as the facts of that case were concerned ; that the engines and boilers, though attached to the realty, were to be treated as personalty under the 25th section of the Revenue Act, which mentions "every steam engine, including boilers, and the value thereof," as the sixth item in the schedule of personal property. 2 Starr & Cur., page 2036.

The evidence in the case at bar shows, that the machinery in appellant's building, used for forcing water into the mains and furnishing electric light to the city, "consists of two Worthington pumping engines, two tubular boilers, one New York Safety High Speed Power engine, and one Electric Dynamo and fixtures." The mains and wires, being directly connected with these engines and boilers, which are personal property for the purposes of taxation under the doctrine of the *Johnson* case, can as well be held to be a part of the machinery, as of the realty to which the machinery is attached. If they are a part of the engines and boilers, with which they are connected, they may, like such engines and boilers, be regarded as personal property for the purpose of taxation. In *Commonwealth v. Lowell Gas Light Co.* 12 Allen, 75, it was held, that the gas mains and pipes, laid down in the streets for the purpose of distributing gas to the consumers, constituted a part of the machinery in operation at the gas works. So, also, in *Memphis Gas Light Co., v. The State, supra*, it was held that the pipes were a part of the apparatus for the delivery of gas to the consumers ; that the delivery was as much within the purpose of the creation of the gas company as the manufacture ; that the apparatus for delivery was merely an extension and continuation of the apparatus for manufacture, and that both belonged to the manufacturing establishment. In the present case, the water mains and electric wires are a part of the apparatus for the delivery of water and light to the inhabitants of the city, and, as such, constitute a part of the machinery, including the

engines and boilers, which is located in appellant's building. We think the mains and wires were properly assessed as personal property.

* * * * *

NOTE.—Earlier cases than this and the preceding, upon similar subjects, may be found in the previous volumes of this series, under index-title, "Poles and wires as property."

THE PEOPLE, EX REL. THE BRUSH ELECTRIC MANUFACTURING COMPANY, Appellant, v. EDWARD WEMPLE, Comptroller, Respondent.

New York Court of Appeals, Jan. 20, 1892.

(129 N. Y. 548.)

ELECTRIC LIGHT COMPANIES.—TAXATION.—STATUTORY CONSTRUCTION.

An electric light company is a manufacturing corporation, within the meaning of the New York statute for taxation of corporations, which exempts manufacturing corporations from such taxation.

APPEAL from judgment of General Term, Third Department, entered upon an order modifying, and affirming as modified, a decision of the State comptroller denying a petition of an electric light company for revision and readjustment of its account for taxes under laws 1880, chap. 542, which provides for taxation of certain corporations. Facts stated in opinion.

John W. Houston, for appellant.

Charles F. Tabor, Attorney-General, for respondent.

O'BRIEN, J.: This appeal brings here for review, a judgment entered upon the return to a writ of *certiorari*,

sued out by the relator, for the purpose of reviewing a decision or determination of the defendant as comptroller of the State, whereby the relator was adjudged liable to pay certain taxes and penalties to the State under chapter 361 of the laws of 1881, and the laws supplementary thereto and amendatory thereof, providing for the assessment and payment of taxes to the State by certain corporations. The relator is a domestic corporation, organized by filing a certificate February 17, 1881, under the act of 1848, providing for the formation of corporations for manufacturing and other purposes. Since its organization it has been engaged in the business of producing electricity and supplying the same to its customers in the city of New York for the purpose of lighting public and private places. The relator contended that it was a manufacturing corporation, and as such exempt from paying the tax to the State upon its business, and made no reports and paid no tax till July, 1889, and then only by force of chapter 353 of the laws of 1889, which took electric light companies, by name, out of the exemption clause in favor of manufacturing corporations. The relator is, beyond all controversy, liable for the tax since the passage of the act last mentioned, but denies that it is liable for anything before, as the exemption clause covering manufacturing corporations then applied to it. In the year 1889 the comptroller caused an examination of the affairs of the relator to be made by a commissioner appointed by him, and upon his report made a statement of the account between the relator and the State, and determined the amount of the tax and penalty due to the state at \$10,752.50. The comptroller then issued his warrant to the sheriff, under the statute, directing the collection of the tax out of the relator's property, and it was thus compelled to pay in order to protect its property from sale, and it did pay under protest. By chapter 463 of the laws of 1889, power is given to the comptroller at any time to revise and readjust any account for taxes settled against any corporation by him or any of his predecessors in office, for taxes

arising under the statute, when it is made to appear by evidence submitted to him that the same has been illegally paid, or when it includes taxes that could not have been lawfully demanded, and he was required to re-settle the account according to law and the facts, as to charge or credit, as the case might be, the difference, if any, resulting from such revision and re-settlement, upon the current account of such corporation. The relator, claiming the benefits of this statute, filed with the comptroller, August 4, 1890, an application in writing in the form of a petition for a revision and re-adjustment of the taxes previously levied and paid. This application was verified and accompanied by proofs to show that the relator was a manufacturing corporation, and for that reason the taxes paid by it could not have been lawfully demanded by the State. The comptroller denied this application, and from this order, refusing the revision asked for, the relator sought relief in the courts by means of the writ of *certiorari*. The relator did not complain of the amount determined by the comptroller, and the only question which was the subject of controversy on the application for a revision was whether the relator was or was not exempt from payment of taxes as a manufacturing corporation.

* * * * *

The right of the State to receive the tax assessed upon the relator depends upon the question whether it was or was not a manufacturing corporation. In the original act providing for the payment of taxes to the State by certain corporations, "manufacturing corporations carrying on manufactures within this State" were exempted from its operation. Laws of 1880, ch. 542, § 3.

In the practical operation of the law it was soon discovered that these broad general words of exemption covered and protected from the payment of the tax a class of corporations which the Legislature probably did not intend to relieve when inserting the words of exemption in the statute. Accordingly it was found necessary from time to time, as the cases arose, to take out of the general ex-

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emption certain corporations by name which the Legislature thought were not within its policy. The courts held that gas companies were manufacturing companies (*Nassau Gas Light Co. v. City of Brooklyn*, 89 N. Y. 409), and the Legislature in 1881 proceeded to amend the law by providing that gas companies should not be taken to be within the exemption. So electric lighting and power companies were taken out of the exemption by the use of similar language. Laws of 1889, chap. 353. These amendments, it is contended in behalf of the relator, show a construction by the Legislature of the term "manufacturing corporations," in harmony with its claims in this case. In so far as the action of the Legislature has any bearing on the question at all, it is, no doubt, in that direction. But the circumstances under which the amendment of 1889 was made deprive it of much of the weight that courts are accustomed to give to what is known as legislative construction. A controversy then existed, as it had existed for some time before, between the state on the one hand and the companies on the other. The companies claimed that they were exempt, as manufacturing companies, from liability to pay taxes to the State under the act, while the comptroller, representing the State, asserted the contrary. In this condition of things the Legislature stepped in and enacted that thereafter the companies should not be deemed within the exemption clause, and this settled the controversy so far as the future was concerned, but, as to the years that had elapsed when no report was made or any taxes paid, the question was left substantially where it was before. When a material change in phraseology is made many years after the passage of the act, and after controversies and differences in regard to its construction have arisen, there is sometimes a presumption that the Legislature intended by the amendment to add a new provision to the original act, and to make it apply to a case to which it did not apply before. When the Legislature takes certain property, for the purposes of taxation, out of an exemption clause by name, the question arises whether there is not a presump-

tion in such a case that it was within it before. *People v. Board of Supervisors*, 16 N. Y. 431; *People v. Knickerbocker Ice Co.*, 99 id. 184.

As the statute now reads, certain manufacturing companies are by name taken out of the exemption and subjected to the payment of the tax. Whether without this special exception they would still be exempt, under the general words of the exemption clause, is substantially the question involved here. Electric light and power companies are not now manufacturing companies within the statute under consideration, because the Legislature, in 1880, so enacted. But it does not follow that because the Legislature then declared that they should not be deemed manufacturing corporations and thus not exempt from payment of the tax, that they were not such, and so exempt before. In determining whether a given case is within a clause in a statute exempting certain property or interests from taxation, the policy of the law in making the exemption must be considered and should have great weight. If the question whether a corporation engaged in the business of furnishing electricity for lighting public and private places or for power, is a manufacturing company, was made to depend upon the meaning of these words as found in dictionaries, or upon the technical language of science in describing electricity as a power or as an agent in nature, it would doubtless be difficult and perhaps impossible to show that the process which the relator calls manufacturing produces anything that in a certain sense and in some form did not exist before. That, however, is true of most if not all manufacturing operations. The application of labor and skill to materials that exist in a natural state, gives to them a new quality or characteristic and adapts them to new uses, and the process by which this result is brought about is called manufacturing, whether the change is accomplished by manual labor or by means of machinery.

But we think that these considerations are by no means conclusive in determining the true scope and meaning of the terms "manufacturing corporations," as they are used

in the statute," The true inquiry would seem to be whether a corporation organized as this is, and carrying on the business that this does, and in the manner shown, would not be considered in common language as engaged in some manufacturing process, or carrying on some manufacturing business, though granting all that is said by experts and others about electricity as a natural element or force. To say that electricity exists in a state of nature, and that a corporation engaged in the business that the relator is, collects or gathers it, does not fully or accurately express the process by means of which it is enabled to sell and deliver something useful and valuable to its customers. The business in which the corporation is engaged renders it necessary, in the first place, to invest a large amount of capital in a plant which may appropriately enough be called a factory. Then it must purchase and consume a vast amount of coal to produce steam, and to furnish power for the operation of machinery. Then it supplies and operates a complicated system of machinery, such as boilers, engines, dynamos, shafting, belting and such other things as are commonly used in manufacturing establishments, and then, by means of wire, cables and lamps, it lights streets and private houses by electricity for a compensation. But the electricity or electric currents that produce this result cannot properly be said to be the free gift of nature, gathered from the air or the clouds. It is the product of capital and labor and in this respect cannot be distinguished from ordinary manufacturing operations. According to the common understanding the electricity or thing which produced the results from which the corporation derives its income, is generated or produced by the application of power to machinery, and thus, by means of a process wholly artificial, the relator is enabled to sell the product of its operations to its customers. Passing by the refinements of scientific discussion as to the nature of electricity, it would seem to be common sense to hold that a corporation that does all this is, in every just sense of the term, a manufacturing corporation. The mere appropriation or

use of an article or thing which is furnished by nature is not a manufacturing operation. The liberation of natural gas from its hiding place in the earth and its transportation through pipes to consumers, would not properly be called a manufacturing operation, but the production of illuminating gas and its distribution to customers, by means similar to the operations which the relator carries on, has been held by this court to constitute manufacturing, and a corporation organized for that purpose is a manufacturing corporation. *Nassau Gas Light Co. v. City of Brooklyn, supra.*

So, too, we have held that the collection, storage, preparation for market and transportation of ice is not a manufacture, but the production of ice by artificial means is. *People v. Knickerbocker Ice Co.*, 99 N. Y. 181.

When we attempt to establish the proposition that the gas which lights one room is a manufactured product, and the electricity which lights another is not, we are obliged to rely more upon the definition of terms and the distinctions of scientists than the actual practical processes and operations by means of which results, in all respects or at least substantially the same, are produced. If due weight is given to the fact that electricity, as now used and applied to the business of life, such as the lighting of streets and buildings, the propulsion of cars and machinery and like operations, is essentially the product of the skill and labor of man, there is no difficulty in reaching the conclusion that a corporation engaged in the business of generating, storing, transmitting and selling it is, what was commonly known at the time of the passage of the corporation tax law in 1880, a manufacturing corporation. The learned judge who gave the opinion in one of those cases at the General Term has extracted from the proofs before the comptroller, on the application of the relator, a concise and accurate description of the mechanical process used in the business of electrical illumination, which, on account of its clearness and brevity, conveys the idea better than any language we could employ.

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“A steam engine is used as a motive power for the propulsion of machinery, which is attached to a driving wheel, which, by means of a belt connected with another wheel or pulley of the dynamo, turns or revolves the armature. The armature is a coil of wire wound on a metal core, and mounted on a shaft, and is revolved by the power communicated from the engine through the means of the belt. The armature is revolved within or between the ends of a large horseshoe magnet, the opening of which is downward. The magnet is made by winding a soft iron horseshoe, or soft curved horseshoe shaped iron, with a coil of conducting wire, and sending through the coil a current of electricity. When once vitalized by such current, the magnet never loses its magnetic property, even after the current stops, but is ever afterwards available for the purpose of electric currents, upon the armature being revolved between the poles of this magnet. By the rapid revolution of the armature within what is termed the field of force between the poles of the magnet, this mysterious force or energy is accumulated, known as electricity, and is thence conducted over copper bars or mains throughout the territory or city in which it is used, and is distributed on smaller wires or mains to the houses or places which are to be lighted.”

The materials from which all manufactured things originate exist in a natural state; but the manufacturer, by the application to these materials of labor and skill, gives to them a new and useful property. The electricity which is generated and transmitted by the operations of the relator, and which, under its manipulations, illuminates houses and streets, is a very different thing from that mysterious element that is said to pervade nature. The attorney-general has attached to his brief in this case a very elaborate and able opinion by the Court of Common Pleas in Pennsylvania in the case of *Commonwealth of Pennsylvania v. U. S. Electric Lighting Company*, in which the learned judge arrives at the conclusion that companies of this kind are not manufacturing corporations. It is proper to say, however, that the highest court of that State, while affirm-

ing the judgment rendered by the learned judge on other grounds, did not assent to his views that electric light companies are not manufacturing corporations. *Commonwealth of Pennsylvania v. Northern Electric Light and Power Company*. The case is not yet reported, but the following passage from the opinion of the court by WILLIAMS, J., expresses views upon this question which are applicable to the case at bar.

"This company, whose character we are considering, sells the electricity it makes, or 'brings into being,' as a commodity. It provides the lamps or appliances for the use of its customers, by means of which the light is produced. It sells them the electricity, measures it as it is delivered, and is paid for according to the quantity furnished. Whatever electricity may be, it seems absolutely within the power and under the control of the company that brings it into being. It is compelled, by the process employed, to come into being. It is secured, stored, poured out or liberated at will. Its manifestations are both seen and felt. It moves with incredible velocity and power, it carries the tones and inflections of the human voice, or moves loaded cars, depending on the volume of the current and the manner of its application. It may be, in the hands of a physician, a soothing remedial agent, and in the hands of the law, an instrument of execution, swifter and surer than the headman's axe. It may be too early to show just what it is. The scientists, whose views the learned judge adopted, may be right or wrong. We have no need to decide that question. The laws are written, ordinarily, in the language of the people, and not in that of science; and if this case depended on the question on which it turned in the court below, we should be led by the findings of fact to a different conclusion from that which was there reached, and hold that this company was a manufacturing company."

The facts that are before us in this case, touching the manner of generating and using electricity, are the same in substance as were before the Supreme Court of Pennsylvania in the case above referred to. One of the experts,

whose testimony was submitted to the comptroller by the relator on the application to revise and resettle the tax, thus described the process:

“The electrical energy, which is manufactured and sold by electric lighting corporations, originally resides in, and is extracted from, the coal which is burned, or, more correctly speaking, from the heat which is produced by the combustion of coal. Electrical energy is produced at the central station; it may be stored up in cells of definite capacity known as accumulators; it may be, and in fact is, measured and sold in determinate quantities at a fixed price precisely as are coal, kerosene oil and gas. It may be conveyed to the premises of the consumer upon a wagon boxed up in an accumulator, or it may be sent through a wire. just as gas or oil may be transported either in a closed tank or forced through a pipe. Having reached the premises of the consumer, it may be used in any way he may desire, being, like illuminating gas, capable of being transformed either into heat, light or power at the option of the purchaser.”

The Legislature has, in various acts passed since the corporation tax law was enacted, described the process of generating electricity as a manufacturing process, and recently, in a revision of the statutes providing for the incorporation of such companies, they are described as corporations for “manufacturing and using electricity.” Laws of 1890, ch. 556, art. 6, § 60; Laws of 1882, ch. 73, § 1; Laws of 1887, ch. 716.

This is also true with respect to the statutes passed for the incorporation and regulation of such companies in England, and in many of our sister States. 45 and 46 Vict., ch. 56; R. S. Ohio, 1890, § 8752. We think that, until the amendment of 1889, the relator was exempt from payment of taxes to the State under the exception in the statute in favor of “manufacturing companies” generally. The judgment of the General Term and determination of the comptroller should be reversed, and the comptroller directed to resettle the account, and to credit the relator in

its account the amount of the tax and penalties paid, with interest from the date of payment, and costs in all courts to the relator.

All concur.

Judgment accordingly.

NOTE.— See note to next case.

LAMBORN, Appellant, v. BELL, Appellee.

Colorado Supreme Court, April, 1893.

(18 Col. 846.)

EMINENT DOMAIN.—ELECTRIC LIGHT IS MANUFACTURING PURPOSE.
The operating of an electric light plant is manufacturing, so that a right of way for a ditch to convey water for said purpose may be condemned without violating the State Constitution.

APPEAL by defendant from decree of the District Court, El Paso county, in a proceeding to condemn a right of way for a ditch to convey water.

The jury found as facts:

First. That it was and is necessary for petitioner herein to take and appropriate the lands of defendant described in the petition herein, for the purpose of furnishing petitioner with power to run an electric plant to generate electricity for the purpose of lighting the town and buildings of Manitou with electric light.

Second. That it was and is necessary for petitioner herein to take and appropriate the lands of defendant described in the petition, for purposes of irrigating the lands of petitioner lying under said ditch described in the petition, and assessed the actual value of the land taken at \$12.50.

A. B. McKinley, for appellant.

Colburn & Dudley, for appellee.

Lamborn v. Bell.

Mr. Justice GODDARD delivered the opinion of the court:
The questions presented by the record are:

First. Has the petitioner a right to condemn a right of way over the lands of the defendant for the purpose of carrying the water to furnish power to operate an electric light plant?

Second. Has he a right to have a ditch across said land for irrigation purposes for his own use, under the facts shown?

The first proposition depends upon the effect to be given to the following constitutional provisions:

That private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes or ditches, on or across the lands of others, for agriculture, mining, milling, domestic or sanitary purposes. (Sec. 14, art. 2, Bill of Rights.)

That private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for use alleged to be public, the question whether the contemplated use be really public, shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public. (Sec. 15, ib.)

The water of every natural stream, not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the State, subject to appropriation as hereinafter provided. (Sec. 5, art. 16, Mining and Irrigation.)

The right to divert unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. (Sec. 6, ib.)

All persons and corporations shall have the right of way across public, private and corporate lands for the construction of ditches, canals and

fumes, for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation. (Sec. 7, ib.)

It is apparent from the foregoing provisions that our Constitution is, in certain particulars touching the right to take private property for private use, exceptional; and for certain enumerated uses changes the accepted rule that the use to which private property may be condemned must be public.

The right of eminent domain is an exercise of sovereign power and is generally conferred by legislative enactment; yet a constitutional provision that in express terms affirmatively confers the right for particular use, is likewise an expression of the sovereign will, and grants the right as effectually as if expressed in an act of the Legislature, and can be enforced when such grant is supplemented by an act of the Legislature providing the means for its exercise.

"A constitution is but a higher form of statutory law, and it is entirely competent for the people, if they so desire, to incorporate into it self-executing enactments. These are much more common than formerly, the object being to put it beyond the power of the Legislature to render them nugatory by refusing to enact legislation to carry them into effect. Prohibitory provisions in a constitution are usually self-executing, to the extent that anything done in violation of them is void. But instances of affirmative self-executing provisions are numerous in almost every modern constitution." *Willis v. St. Paul Sanitation Co.*, 50 N. W. Rep., p. 1111. See, also, *State v. Roberts*, 4 Neb. 216; *Thomas v. Owens*, 4 Md. 189.

It becomes necessary, therefore, to determine whether the purpose relied on in this proceeding, as expressed in the first proposition, is within the class of uses enumerated in section 14 of article 2, and section 7 of article 16 of the Constitution, above cited.

It is insisted by counsel for appellant that these constitutional provisions should be read in the light of the conditions existing at the time they were adopted, and be

construed in relation to the evident purposes they were intended to subserve; that the necessity for irrigation and the paramount industry of mining were in contemplation by the framers of the Constitution, and the term *milling* was used in section 14 of article 2 with relation to those purposes, and its meaning should be restricted to milling ore and grain.

We think the term *milling*, as used in that provision, should be given its modern acceptation, and held as synonymous with the word *manufacturing*, if not of broader signification, and including that term. Webster, after defining the word mill, says:

“In modern usage, the term *mill* includes various other machines, or combinations of machinery, * * * as cotton mills, * * * fulling mills, * * * powder mills, etc., * * * to some of which the term *manufactory* or *factory* is also applied.”

It was held in *Garlin v. Western Assurance Co.*, 57 Md. 515, that a flouring mill came within the term *manufacturing establishment*, as used in a policy of insurance. In discussing this branch of the case, at page 526, RITCHIE, J., says:

“The right of the plaintiff to run his mill at night depends upon whether the mill was a ‘manufacturing establishment.’ * * * But what is to be deemed a manufacturing establishment; or in other words, what is the signification of the verb *to manufacture*, is for the court to define. The counsel for appellant contended that making flour from wheat, reasoning from the etymology of the word, and the nature of the process, is not manufacturing. But whilst, from its derivation, the primary meaning of the word ‘manufacture’ is making with the hand, this definition is too narrow for its present use. Its meaning has expanded as workmanship and art have advanced, so that now nearly all artificial products of human industry, nearly all such materials as have acquired changed conditions or new and specific combinations, whether from the direct action of the human hand, from chemical processes devised

and directed by human skill, or by the employment of machinery, which after all is but a higher form of the simple implements with which the human hand fashioned its creations in ruder ages, are now commonly designated as 'manufactured.'

"Burrill defines 'to manufacture,' 'the process of making a thing by art,' and cites BUTLER, J., in 2 H. Bl. 463, 471. Abbott gives its meaning as 'whatever is made by human labor, either directly or through the instrumentality of machinery.' The definition in Webster is, 'To make or fabricate from raw materials by the hand by art or machinery, and work into forms convenient for use.' Worcester has in substance the same definition. A case directly applicable is that of *Schriefer v. Wood*, 5 Blatch. 215, in which animal charcoal, produced by the process of burning bone, in the same manner that wood is exposed to the action of fire, to produce common charcoal, and bone-dust, produced by pulverizing or grinding bones, are decided to be 'manufactures of bone.' The question here considered was involved in that case, and the decision accords with the view we have expressed. We think, therefore, that plaintiff's flour mill, driven as it was by steam, and furnished with a middling purifier, band-duster, belting and other machinery, was clearly a 'manufacturing establishment.' "

We cite the foregoing at length, as it upholds our view of the meaning to be given to the words "manufacturing purposes," and also shows that the purpose of appellee is within the ordinary meaning of those terms.

So regarded, the word *manufacturing* can be given its well understood meaning, and come within the exceptions enumerated in section 14, article 2, and be given its full signification in section 7, article 16, and also in section 6, article 2, wherein it is designated as one of the beneficial uses for which an appropriation of water may be made.

With this view the different sections may be harmonized

and effect given to both, a result always to be reached in the construction of such instruments, if practicable.

“The rule applicable here is, that effect is to be given, if possible, to the whole instrument, and to every section and clause. If different portions seem to conflict, the courts must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory.

“This rule is applicable with special force to written constitutions, in which the people will be presumed to have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, leaving as little as possible to implication.” Cooley’s Const. Lim. 72.

That the words, “manufacturing purposes,” used in these several provisions, should be taken in their ordinary acceptation, we have no doubt; and the purpose of petitioner coming within their ordinary meaning, we are to determine whether the exercise of the right is available to him under the terms of section 7, article 16, and the legislation of the State upon the subject of eminent domain.

While it may be conceded that the constitutional provision is not self-executing in the sense that it does not provide the manner in which compensation can be assessed, it nevertheless does confer the right in express terms; and it only remains to be determined whether provision is made to carry out such right.

The eminent domain act provides (sec. 2, p. 201, Laws of 1885): “That in all cases where the right to take private property for public or private use, without the owner’s consent, * * * has been heretofore, or shall hereafter, be conferred by general laws or special charter,” etc.

The constitutional provision above referred to must certainly be regarded as a general law conferring the right within the language of this section; hence, the act providing the procedure to ascertain the compensation makes the right available, and the question whether the constitu-

tional provision is or is not in itself self-executing becomes immaterial.

We think, under the provisions cited, the right to condemn a right of way for a ditch over appellant's land for the purposes designated is conferred, and that the eminent domain act provides for the exercise of that right.

[That portion of the opinion which relates to an irrigation ditch is omitted].

NOTE.—To the same point as this and the preceding case, see *Beggs v. Nelson Mfg. Iron, Co.*, vol. 3, p. 504.

DELAWARE & ATLANTIC TELEGRAPH & TELEPHONE COMPANY V. STATE OF DELAWARE, EX REL. POSTAL TELEGRAPH CABLE COMPANY.

U. S. Circuit Court of Appeals, Third Circuit, April 21, 1893.

(56 Fed. Rep. 677.)

TELEPHONE COMPANY.—CONTRACT FOR DISCRIMINATION.

Telephone companies have assumed the character, functions and duties of common carriers, and thus made themselves subject to the same principles and rules of law applicable to all other common carriers, the chief one of which is that they must serve the public impartially.

Local telephone companies cannot, therefore, legally bind themselves by contract, even with the parent company which owns the apparatus leased to and used by them, to discriminate in favor of one telegraph company and against others, refusing to furnish to the latter telephone instruments and service to be used in receiving and transmitting messages.

This is not affected by the fact that the telephone instruments are patented, for if patented instruments are applied to public use, the rules governing such use must be observed.

Cases of this series cited in opinion: *American Rapid Tel. Co. v. Conn. Tel. Co.*, vol. 1, p. 390; *Chesapeake & Pot. Tel. Co. v. B. & O. Tel. Co.*, vol. 2, p. 416; *Missouri v. Bell Teleph. Co.*, vol. 2, p. 404; *Ohio v. Bell Teleph. Co.*, vol. 1, p. 296; *Missouri v. Bell Teleph. Co.*, vol. 1, p. 304, note; *Com.*

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Un. Teleph. Co. v. N. E. Teleph & Tel. Co., vol. 2, p. 426; *Louisville Transfer Co., v. Am. Dist. Tel. Co.*, vol. 1, p. 805, note; *Cent. Un. Teleph. v. Co., State, ex rel. Falley*, vol. 2, p. 27.

ERROR to United States Circuit Court, District of Delaware.

Appeal by respondent from order awarding writ of mandamus to compel telephone company to furnish instruments and service. Facts stated in opinion.

Charles L. Buckingham and *Edward G. Bradford*, for plaintiff in error.

R. S. Guernsey and *George H. Bates*, for defendant in error.

BUTLER, District Judge: There is no controversy about the facts of this case. The relator owns and operates a telegraph system with lines extending throughout the country, having its principal office in the city of Wilmington. The respondent owns and operates a telephone exchange in Wilmington connected with the places of business and residences of subscribers, to whom telephonic facilities are furnished. One of the subscribers enjoying such facilities is the Western Union Telegraph Company. The relator, desiring similar facilities, on the 20th of November, 1889, applied to the respondent for connection with its exchange, and the application was refused. The proofs show that up to November 10, 1879, the National Bell Telephone Company and the Western Union Telegraph Company were owners of rival telephone patents about which they had been engaged in litigation. At that date they entered into a contract by virtue of which the former company became owner of the patents previously held by the latter, and the latter company acquired an exclusive license to use the telephone for transmitting telegraphic messages under all the patents for a term of 17 years. Subsequently the patents were assigned, subject to this license, to the American Bell Telephone Company. All licenses, including

the respondent's, subsequently granted under the patents, have been made subject to that of the Western Union Telegraph Company.

It is no longer open to question that telephone and telegraph companies are subject to the rules governing common carriers and others engaged in other like public employment. This has been so frequently decided that the point must be regarded as settled. While it has not been directly before the Supreme Court of the United States, cases in which it has been so determined are cited approvingly by that court in *Budd v. New York*, 143 U. S. 517 (12 Sup. Ct. Rep. 468.) While such companies are not required to extend their facilities beyond such reasonable limits as they prescribe for themselves, they cannot discriminate between individuals of classes which they undertake to serve. As common carriers of merchandise may prescribe the points between which they will carry and the description of goods they will accept, so, doubtless, may carriers of messages limit their business and obligations. If, therefore, the respondent had confined the use of its telephonic facilities to the carriage of personal messages for individuals, excluding those of telegraph companies and others who forward messages for hire, the relator would, probably, have no just ground of complaint. As we have seen, however, it did not so limit its business, but carried telegraphic messages as well as others. The respondent contends, however, that this was not its voluntary act; that the Western Union Telegraph Company had acquired rights superior to its own, and that it could not, therefore, exclude this company from the use of its facilities. This position cannot be sustained. The admission of the Western Union Telegraph Company to its system was the respondent's voluntary act. Such admission could only be obtained by its express consent. To say that its license required such admission does not help the respondent. It voluntarily accepted the license and assented to its terms. Nor does it help the respondent to say that the license could not be obtained on other terms. If not, it could have been

declined. Had it been, and the business avoided, the responsibilities which attend it would also have been avoided. Accepting the license, however, as the respondent did, and engaging in the carriage of messages, it cannot escape the public duties which attend the employment. It must carry for all persons belonging to the classes it undertakes to accommodate. Its alleged responsibility to the licensor for so carrying impartially affords no excuse. The responsibility was improperly assumed, if it exists. But it does not exist. The object of the stipulation out of which it is supposed to arise, as well as that of the contract in which it originated, between the Western Union Telegraph Company and the National Bell Telephone Company was to accomplish a result which the law forbids. In other words, it was to effect precisely what has occurred — the establishment of a system of telephone lines and exchanges to carry telegraphic messages, as well as others, which should be so conducted as to confer a monopoly on one telegraph company. Had the owner of the patents come to Delaware and undertaken to do what has been done, it can scarcely be questioned that its act would have been unlawful. And yet this is substantially what has occurred. The owner has effected it through the instrumentality of a license. The respondent has simply done what the owner authorized and required.

It is urged, however, that the Western Union Telegraph Company is not a mere licensee of the National Bell Telephone Company, but something more ; that prior to its contract with that company, it was the exclusive owner of certain patents, under which it might have applied the telephone to its own exclusive use in carrying telegraphic messages ; that the effect of its contract was to leave its right to do this unimpaired ; and that its subsequent arrangement with the respondent for carrying its messages is simply the exercise of this right, of which no one can justly complain. This statement is defective in several particulars. *First*, it is not true that the Western Union Telegraph Company was originally the owner of patents which

enabled it to apply the telephone to its use. Its patents, as conceded on the argument, were mainly, if not exclusively, for improvements on the Bell invention, which could not be used without license from the National Bell Telephone Company. *Second*, it parted absolutely with these patents and took a license, not under them alone, but also under the former patents of the National Bell Telephone Company. It is therefore a licensee and nothing more. But this fact that it is simply a licensee is not of essential importance. The difficulty encountered does not arise out of it, but out of the circumstance that the Western Union Telegraph Company did not employ its rights in the manner above indicated. Had it done so, and thus kept its interest and business distinct and separate from that of subsequent licensees by establishing its own system of lines and exchanges and confining such subsequent licensees to the transmission of individual messages, this controversy might not, and doubtless would not, have arisen. Instead, however, and no doubt to avoid the expense attending it which would possibly have rendered the scheme impracticable, the Western Union Telegraph Company sought through the means devised and employed to secure an advantage over other similar companies, by obtaining a monopoly in the systems and business of such licensees. In other words, it contracted with these licensees to carry its messages to the exclusion of all similar messages of others. This, as we have seen, the licensees could not lawfully do; and consequently, as before stated, the contracts by which it was sought to be accomplished are void.

The respondent supposes importance is attributable to the fact that the telephone is protected by patent, and cites *American Rapid Tel. Co. v. Connecticut Tel. Co.*, 49 Conn. 352, 372, in which it is said:

"The plaintiff insists that the defendant has offered its services to the public as a common carrier of articulate speech; that it has thereby made itself the servant of the public and has subjected itself to the operation of the gen-

eral law which compels all such servants to serve applicants impartially, regardless of the limitations placed upon its use of the instruments. But the property of the American Bell Telephone Company in its patents is absolute and exclusive; it can rent or sell it in whole or in part; it can refuse to make or use, or to allow any one else to make or use, the telephone described in it; or it can make and sell one and no more, and put such restrictions as it pleases upon the time, place and manner of using that; and it was the privilege of the Connecticut Telephone Company to purchase from it even the most limited right to use one or more of its instruments, and it is not within the power of the court either to enlarge or diminish the purchase."

This statement is mainly correct, but the deductions drawn from it—that one engaged in the business of carrying messages who employs the telephone as a means of conveyance is exempt from the operation of the rules which govern common carriers and others engaged in like public employment—we cannot adopt. Where one engages in such public business it is of no consequence whether the means or instruments whereby it is conducted are patented or not. It is the *business* that is regulated. A patent secures title to the thing patented and its use, just as the law secures title to other descriptions of property. The owner need not apply his property of either description to such public employment, but if he does, the employment itself will be subject to the rules which the law has prescribed for its government without respect to the means or instrument by which it is conducted.

We do not regard the *Express Cases*, 117 U. S. 1 (6 Sup. Ct. Rep. 542, 628), cited by the respondent, as applicable here. On the facts they are distinguishable from this case; and the exception which they establish to the general rules governing common carriers is not likely to be enlarged. The history of these cases, the division of the court over them, and the opinion of the several circuit courts in which they originated, do not, we think, leave this in doubt.

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It would be unprofitable to extend the discussion. The decisions of the several State courts in cases involving the same questions, and their citation with approval by the Supreme Court of the United States, are virtually conclusive. See *Chesapeake & P. Tel. Co. v. Baltimore & O. Tel. Co.*, 66 Md. 399 (7 Atl. Rep. 809); *State of Missouri v. Bell Telephone Co.*, 23 Fed. Rep. 539; *State of Ohio v. Bell Telephone Co.*, 36 Ohio St. 296; *State v. Bell Telephone Co.*, 22 Alb. Law J. 363; *Commercial Union Tel. Co. v. New England Telephone & Telegraph Co.*, 61 Vt. 241 (17 Atl. Rep. 1071); *Louisville Transfer Co. v. American Dist. Tel. Co.*, 1 Ky. Law J. 144; *Central Union Telephone Co. v. State*, 118 Ind. 144 (19 N. E. Rep. 604); *Budd v. New York*, *supra*.

The judgment of the Circuit Court is affirmed.

NOTE.—Earlier cases upon the same subject as the foregoing may be found in previous volumes of this series under index-title "Discrimination."

STATE, ON THE RELATION OF THE RAILROAD COMMISSIONERS, v. WESTERN UNION TELEGRAPH COMPANY.

North Carolina Supreme Court, Nov. 21, 1893.

(118 N. C. 213.)

STATE REGULATION OF TELEGRAPH RATES.—INTERSTATE COMMERCE.

The statute of North Carolina, which authorizes and requires the board of railroad commissioners to make "just and reasonable rates of charges for the transmission of messages by any telegraph line or lines doing business in the State" is not repugnant to the interstate commerce provision of the Federal Constitution, as to a telegraph line which, in connecting two points within the State, passes through another State.

Said board has the incidental power to inquire what corporation owns or controls a telegraph line.

It has not power to direct the opening of any given telegraph offices for commercial business.

APPEAL by defendant from order of Board of Railroad Commissioners. Facts sufficiently stated in opinion.

R. O. Burton, for plaintiff.

Strong & Strong and *Robt. Styles*, for defendant (appellant).

SHEPARD, C. J.: The Board of Railroad Commissioners is

Authorized and required to make or cause to be made just and reasonable rates of charges for the transmission of messages by any telegraph line or lines doing business in the State. Laws 1891, ch. 220, § 26.

It may cause notice to be served upon corporations or persons charged with a violation of the rules prescribed by it in pursuance of the above authority, and upon a hearing, may ascertain and direct ample and full recompense to be

made by the company, corporation or person offending, which recompense may be enforced by civil action, as prescribed in section 10 of said act. *Mayo v. Telegraph Co.*, 112 N. C. 343. It is a court of record, with "the powers and jurisdiction of a court of general jurisdiction," as to all subjects embraced in said act, by virtue of the laws of 1891, ch. 498. *Express Co. v. Railroad*, 111 N. C. 463.

The defendant being served with process appeared before this court to answer the complaint or petition of Eugene Albea, called plaintiff herein, and filed his answer. Thereupon a trial was had, and it appearing that the said Albea, having tendered no commercial message to any of the offices of the defendant, it was adjudged that he had no cause of complaint, and the proceeding was practically dismissed as to him. The commission, however, having the defendant before it, proceeded under its general powers to make rates of charges for the transmission of business by the defendant from and to points in North Carolina, which rate of charges is the same as that applicable to all the offices of the defendant within the limits of the State. The commission, after having disposed of the complaint of Albea, should have amended the proceeding so as to substitute as complainant the "State of North Carolina *ex rel.* the Railroad Commission ;" but as it has been fully heard without reference to this irregularity, we have ordered that the amendment be now made, and the proceeding be entitled accordingly. *The Code*, § 273 ; *Reynolds v. Smathers*, 87 N. C. 24.

The order of the board, which is the subject of review, is as follows :

That the telegraph offices at Edenton and Elizabeth City and at other points on the Norfolk and Southern Railroad in North Carolina, are offices of defendant, and that said offices shall transmit commercial messages at rates prescribed by the commission to any point in North Carolina.

This order is based upon certain findings of fact, some of which are excepted to. But inasmuch as it was agreed that his honor might pass upon these questions in the place

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of a jury, and as there was evidence sufficient to warrant such findings as under the view we have taken are material to be considered, they cannot be reviewed in this court. *Battle v. Mayo*, 102 N. C. 413; *Fertilizer Co. v. Reams*, 105 N. C. 283.

It appears, in the language of his honor, "that the defendant owns, controls and operates a line of telegraph from Edenton, N. C., passing through Elizabeth City, N. C., Hertford, Moyock, N. C., and other places along the track of the Norfolk and Southern Railroad to Berkley and Norfolk, Virginia. * * * That the company receives and transmits over this line (commercial) messages at the towns and villages of Hertford, Moyock, and other places along said line to any place in North Carolina where it has an office, at the uniform rate of twenty-five cents per message of ten words, except at Edenton and Elizabeth City," at which last named offices the defendant receives no commercial business; the said offices being devoted exclusively to the business of the Norfolk and Southern Railroad Company in respect to the running of its trains, etc.

It is very clear to us that under the authority given it to make rates for "the transmission of messages by any telegraph line or lines doing business in the State," the commission (subject, of course, to the right of appeal) has the incidental power of ascertaining what particular corporation is at least in the control or operation of the same. This would seem indispensably necessary to a proper exercise of its authority to fix rates as well as to know against whom to proceed under section 10 of the act, in the event of a violation of such regulation. The exception in this respect, therefore, must be overruled.

A more serious question, however, is presented by the ruling of the court upon the third conclusion of the commission, which is as follows: "That telegraphic messages transmitted by defendant over its said line from Elizabeth City or Edenton, or *other points* in North Carolina, to points in said State, do not constitute commerce between States, although traversing another State in the route, and

are subject to the rate prescribed by the commission." It appears from the findings of fact that the shortest and only route over the wire of the defendant, by which messages can be transmitted to many points in this State, necessarily "traverses, in part, the State of Virginia, and thence back into North Carolina;" and it is insisted that such messages so transmitted are interstate commerce, and therefore not subject to the tariff regulation of the commission.

It is not denied that the offices of the defendant along the line of the Norfolk and Southern Railroad Company, except those at Edenton and Elizabeth City, receive commercial messages for transmission, in the manner described, to various points in North Carolina, and it is plain that such business does not relate to the intercourse of the citizens of this State with those of some other State. It is purely an intercourse between the citizens of North Carolina through the means afforded by a corporation having extensive facilities of communication within the limits of the said State, and the uniform rates fixed by the commission for the business, which the said corporation accepts, or is under legal obligation to accept, in nowise affects or interferes with any business which the defendant undertakes for the citizens of Virginia, either between themselves or with the citizens of other States. Neither are we able to see how the mere fixing of rates between different points in this State can in any way conflict with any regulation which the State of Virginia may have the power to impose in respect to its domestic business. It must be manifest, therefore, that this business is without a single feature of interstate commerce, unless it can be found in the fact that in the transmission of a message it must traverse a part of the defendant's own line in the State of Virginia. We have been referred to several cases in which it has been held, in respect to the continuous carriage of freight by a railroad company under such circumstances, that a State commission had no power to prescribe rates, and also that a State had no right to levy a tax upon the gross receipts, even as to that part derived from the transportation within its

territory. *State v. Chicago Railroad Co.*, 40 Minn. 267 ; *Sternberger v. Railroad*, 29 S. C. 510 ; *Cotton Exchange v. Railroad*, 2 Interstate Commerce Reports, 386.

Without attempting to discuss these cases, and to distinguish them in some particulars from ours, it is sufficient to say that if they are not distinctly overruled their principle is certainly in conflict with the reasoning of the opinion of the Supreme Court of the United States (FULLER, C. J.) in *Lehigh Valley Railroad Co. v. Pennsylvania*, 145 U. S. 192.

The State of Pennsylvania levied a tax on the gross receipts of all railroad companies derived from the transportation by continuous carriage from points in Pennsylvania to other points in the same State — that is to say, passing out of Pennsylvania into other States and back again into Pennsylvania in the course of transportation.

The Lehigh Valley Railroad Company has no road of its own from Mauch-Chunk, Pennsylvania, to Philadelphia, but in transporting its coal and general freight traffic it uses its own line from Mauch-Chunk to Phillipsburgh, New Jersey, from which point it is, under an arrangement for a continuous passage with the Pennsylvania Railroad Company, transported by the latter road via Trenton to Philadelphia. It was insisted that the State could not tax that part of the gross receipts derived from so much of the transportation as was wholly within the State of Pennsylvania, because the freight, during its entire transportation, was impressed with the character of interstate commerce. The court sustained the tax, and although it may be said that the decision relates only to that part of the receipts which arose from the transportation within the State, yet it must be apparent from a perusal of the opinion that this conclusion was reached on the ground that such continuous transportation was not interstate commerce. Indeed, the entire course of the reasoning of the court is in support of this very principle, and is clearly applicable to the question involved in this appeal. The language of the court is plain and emphatic, and we do not feel at liberty to ignore it, and

especially when it is applied to telegraphic communication, under the peculiar circumstances of this case. The court, in speaking of the grant of power to regulate commerce between the States, remarked: "But, as was said by Chief Justice MARSHALL, the words of the grant do not embrace that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to *nor affect other States*." "Commerce," observed the Chief Justice, "undoubtedly, is traffic, but it is something more; it is intercourse." The court further proceeded to say: "The point of departure and the point of arrival were alike in Pennsylvania. The intercourse was between those points, and not between any other points. Is such intercourse, consisting of continuous transportation between two points in the same State, made interstate because in its accomplishment some portion of another State may be traversed? Is the transmission of freight or messages between two places in the same State made interstate business by the deviation of the railroad or telegraph line on to the soil of another State?" Again, in another part of the opinion it is said: "It is simply whether, in the carriage of freight and passengers between two points in the same State, the mere passage over the soil of another State renders that business foreign which is domestic. We do not think such a view can be reasonably entertained, and are of the opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch-Chunk." The court uses the words "continuous passage," from which it is to be inferred that if, after the freight passed beyond Pennsylvania, it was transferred to another transportation agency in New Jersey, and by this other agency carried to Philadelphia, it would be interstate commerce, and the same if consigned to a point in New Jersey and then re-shipped to Philadelphia. It is in evidence that the defendant owns and operates a continuous wire, or system of wires, from the offices mentioned to other points in North Carolina, and

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therefore it is not compelled to transfer its business to any other agency outside of North Carolina in order that it may reach its destination in this State. In this respect, our case is stronger than the one from Pennsylvania, as the road from Phillipsburgh to Philadelphia was owned and operated by another corporation, and not by the Lehigh Valley Railroad Company. We refrain from entering into an extended discussion of the subject, and are content to follow the reasoning of the Supreme Court of the United States, whose authority upon such questions is conclusive.

We will observe, however, that we think the principle laid down by that court is peculiarly adaptable to cases like the present, in which there is such an exceptional facility for the evasion of State authority to fix the rate of charges. This may be done in an instant and without expense by so adjusting the wires that messages must go through a part of the territory of another State. We think the exception should be overruled.

The remaining exception which it is necessary to consider relates to that part of the order which substantially commands the defendant to open its offices at Edenton and Elizabeth City for the transmission of commercial messages. It is urged, but not very seriously pressed, that the order only means that the company shall transmit such messages at the prescribed rates, whenever it undertakes to do that character of business at those points. The order of the court is not, in our opinion, susceptible of such a construction, but whatever doubt there may be must surely vanish when it is considered in connection with the findings of the commission upon which it is based, and which the court, in its judgment, approves and adopts. This finding is that the operators in said offices "are the agents and operators of the defendant, and that it is their duty to transmit commercial messages when tendered to them to points in North Carolina at the rate prescribed by the commission." It is impossible, without violating all rules of interpretation, as well as destroying the plain import of

language, to adopt the view contended for, and it is, therefore, necessary to determine whether the commission act conferred upon the commission the authority to direct that the said offices should be opened for commercial business. That it has no such authority is settled by the court in *Mayo v. Telegraph Co.*, *supra* (decided since the trial of this proceeding), in which it is declared that "there is nothing to show the intent of the statute to give to the commission power to prescribe other rules and regulations for telegraph lines than those directed in section 26, with regard to their charges for the transmission of messages, as neither of the other sections could be made to apply to telegraph, even if the same had been specifically named." Under this decision, so much of the order as is open to the objection referred to, must be set aside, but in all other respects it is affirmed.

Let it not be understood that we are deciding that a corporation, like the defendant, exercising its franchise, the right of eminent domain, and other unusual privileges, under a grant from the State for the benefit of the public, can give any undue or unreasonable preference or advantage to any particular person, company or corporation. This question may be presented when commercial messages have been tendered and declined at the said offices, but we think it would be going outside of the record to pass upon it now. And especially should we refrain from doing so when the intelligent counsel, who appeared for the defendant, very properly concluded that the court would not anticipate a point of such importance, and therefore did not deem it necessary to discuss it. The order of the court is modified and

Affirmed.

NOTE.—This is the first case in this series in which the power of a State to control the rates for telegraph service has been under consideration. A series of cases upon such power over telephone rates may be found in vol. 2, under index-title "Telephone rates."

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In *Mayo v. W. U. Tel. Co.*, 112 N. C. 343, referred to in the above opinion, the alleged cause of action was due to delay in the transmission of a telegram, and redress was sought under the statute above quoted. A demurrer to the complaint was sustained, upon the ground that the powers conferred upon the board of railroad commissioners, with respect to telegraph companies, was limited to the fixing of rates.

CITY AND COUNTY OF SAN FRANCISCO, Respondent, v.
WESTERN UNION TELEGRAPH COMPANY, Appellant.

California Supreme Court, Sept. 2, 1892.

(96 Cal. 140.)

TAXATION OF TELEGRAPH COMPANY.—POST-ROADS ACT.

A telegraph company which has accepted the provisions of the post-roads act of Congress is an executive instrument of the national government, and therefore not subject to State taxation upon its franchise — upon its right to operate at all.

Cases of this series cited and followed: *Pensacola Tel. Co. v. W. U. Tel. Co.*, vol. 1, p. 250; *Tel. Co. v. Texas*, vol. 1, p. 373.

Distinguished: *W. U. Tel. Co. v. Attorney-General*, vol. 2, p. 57.

Cited: *Attorney-General v. W. U. Tel. Co.*, vol. 3, p. 20.

APPEAL from the Superior Court, city and county of San Francisco. Appeal by defendant in action to recover unpaid taxes.

R. B. Carpenter, for appellant.

W. A. S. Nicholson, for respondent.

McFARLAND, J.: This action was brought to recover a certain sum of money alleged to be due from defendant to plaintiff for State and county taxes, alleged to have been duly assessed and levied "upon personal property of said defendant, to wit, franchise for the fiscal year ending June

30, 1886." Judgment was rendered for plaintiff, and defendant appeals from the judgment.

From the findings of the trial court, and the written stipulations of the parties contained in a bill of exceptions, the following are substantially the facts upon which the appeal must be determined :

During the times mentioned in the complaint, appellant was, and still is, a corporation "organized and existing under the laws of the State of New York, and engaged in the business of transmitting telegraphic messages. "It is not organized under the laws of the State of California, and has derived no franchise therefrom." For the said fiscal year ending June 30, 1886, the appellant was assessed upon all its lines and property within this State for State and city and county taxes, and paid all of said taxes. The assessment upon which the taxes sued for in this action is based is as follows: "Franchise, \$50,000;" and no other taxes or causes of action are here involved.

On July 24, 1866, there was approved an act of the Congress of the United States entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes," which act was put in evidence. It is to be found at pages 221, 222, U. S. Stats. at Large 1865-1867, also incorporated in title LXV of the Revised Statutes. This act provides "That before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the postmaster-general of the restrictions and obligations required by this act;" and such written acceptance was so filed by the appellant herein on June 12, 1867. It is not necessary, at this point, to state in detail the provisions of that act, because the United States Supreme Court, in decisions hereinafter noticed, has declared its nature, purpose, and scope and the character of the rights and privileges which it conferred upon the appellant herein. It is sufficient here to say generally that the act gives the appellant the right to construct and maintain telegraph

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lines, not only through the public domain (portions of which are granted to it) and across navigable streams and waters, but also over and along any of the "post roads of the United States which have been, or may hereafter be, declared such by act of Congress;" that it provides for a priority of telegrams between the departments of the United States government and their officers and agents over all other business, and that they shall be sent at rates fixed by the postmaster-general; and that, under the act, the United States may at any time after five years, for postal, military or other purposes, purchase all the lines and property of the appellant at a value to be appraised in the manner provided in said act. It further appears that on and prior to the first Monday of March, 1885, the defendant, as such corporation, had constructed and was maintaining and operating in the State of California, and along the military and post roads of the United States, and over, under and across the navigable streams or waters of the United States, telegraph lines aggregating 6,531 1-2 miles, and 3,501 1-4 miles of telegraph poles. 34 2-5 miles of said wires and 9 miles of said poles are in the city and county of San Francisco; that all of said lines are used by defendant in the transmission of telegrams from points in the State of California to points in the other states of the United States, and to foreign countries, and from said other states and countries to points within the State of California, as well as in the transmission of telegrams from point to point within the State of California; that the defendant is likewise engaged in the transmission over said wires of messages for, from and between the several departments of the government of the United States; that said messages last mentioned are by this defendant given priority over all other business, and are sent at rates annually fixed by the postmaster-general of the United States.

Under these facts, it is contended by appellant — among other things, which we do not deem it necessary to discuss — that the appellant is one of the means employed by the United States government for carrying into effect its

sovereign powers ; that the attempt to tax its franchise, in addition to the taxes which, in common with others, it pays on its property, is an attempt to tax "the operation of an instrument employed by the government of the Union to carry its powers into execution," within the meaning of the decision in *McCulloch v. Maryland*, 4 Wheat. 316 ; and that, therefore, the taxes sought to be recovered in this action were beyond the jurisdiction of the State to levy, and void.

If the appellant is to be considered an instrument of the national government within the meaning of *McCulloch v. Maryland*, 4 Wheat. 316, then it is quite clear that, within the meaning of that celebrated case, the attempted tax on the franchise of the appellant was a tax upon its "operations." It is true that the State of Maryland had put its attempt to tax the United States bank in the shape of a provision that its notes should be upon stamped paper furnished by the State at certain stated prices ; but it is impossible to see how that method of taxation was any more a tax upon the "operation" of the bank than a general tax upon its franchise—upon its right to operate at all—would have been. There is in principle no distinction between the two methods of effecting the same result. But there is no need of general argument upon the subject, because the precise question was definitely settled by the Supreme Court of the United States in the case of *California v. Central Pacific R. R. Co.*, and other railroad companies, 127 U. S. 1. In that case the State of California had attempted to tax the "franchise" of the railroad company, and the latter set up that it had franchises from the general government, granted under certain well-known acts of Congress, which the State had no jurisdiction to tax. The decision of the court—from which there was no dissent—was delivered by Mr. Justice BRADLEY in a very elaborate opinion, and we have space here only to quote the vital parts of it on the question before us. Having concluded that the railroad company had certain franchises from the general government, the court say : "Assuming

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that the Central Pacific Railroad Company had received the important franchise referred to, by the grant of the United States, the question arises whether they are legitimate subjects of taxation by the State. They were granted to the company for national purposes and to subserve national ends. It seems very clear that the State of California can neither take them away, nor destroy nor abridge them nor cripple them by onerous burdens. Can it tax them? It may undoubtedly tax outside visible property of the company situated within the State. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment it cannot. * * * As Chief Justice MARSHALL said in *McCulloch v. Maryland*, 'the power to tax involves the power to destroy.' Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to State taxation. The power conferred emanates from, and is a portion of, the government that confers it." And, again, the court, speaking of the taxation of a franchise, say: "It has no limitation but the discretion of the taxing power. The value of the franchise is not measured like that of property, but may be ten thousand or ten hundred thousand dollars, as the Legislature may choose. Or, without any valuation of the franchise at all, the tax may be arbitrarily laid. It is not an idle objection, therefore, made by the company against the tax imposed in the present case." Under this decision, therefore, it is entirely clear that if the appellant is an instrument of the national government, within the meaning of *McCulloch v. Maryland*, 4 Wheat. 316, or has franchises granted by that government for national purposes, then the tax involved in the case at bar cannot be maintained.

The remaining question of importance is this: Are the relations of appellant to the national government, and its franchises derived therefrom, of such character as to bring

it within the principles of the case above cited? We think that the decisions of the Supreme Court of the United States answer this question in the affirmative. Indeed, the very case of *California v. Central Pacific R. R. Co.*, 127 U. S. 1, to which we have just referred, seems to be itself a determination of the point in favor of appellant; for a comparison of the railroad acts which were held in that case to have conferred franchises upon the railroad company, with the act of July 24, 1866, respecting telegraph companies (hereinbefore mentioned), shows that the difference between the rights and powers granted in the two instances is a difference of degree only, and not of kind. An interstate railroad is a thing of more magnitude, and has greater financial and commercial value, than an interstate line of wires and poles used for telegraphy. The transportation of troops and munitions of war is, no doubt, a thing of graver importance than the transmission of telegraph messages; but the latter has become, also, an absolute necessity to the proper administration of the national government, either in peace or war. If, therefore, as was held in the decision last mentioned, the rights, privileges, and powers conferred by Congress on the railroad company constitute franchises which a State cannot tax, it seems impossible to escape the conclusion that the rights, privileges and powers thus conferred upon the appellant also constitute such franchises.

But the Supreme Court of the United States has had occasion to declare the character and position of the appellant, with respect to the question here involved, in cases in which the appellant itself was a party to the record.

In December, 1866, the Legislature of Florida passed an act granting to the Pensacola Telegraph Company "the sole and exclusive right and privilege" of maintaining lines of electric telegraph through certain parts of that State. There was nothing in the State Constitution of Florida which prohibited its Legislature from granting such exclusive privileges within its own jurisdiction. Afterwards a certain railroad company granted the right to erect a tele-

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graph line along its right of way, to the Western Union Telegraph Company, the appellant in the case at bar. The latter company had commenced the erection of the line when the said Pensacola Company commenced an action in the United States Circuit Court to enjoin the work, on account of its alleged exclusive right under said act of the Legislature of Florida, with which the proposed line of the Western Union Company competed. The action was dismissed in the Circuit Court, and an appeal was taken by the Pensacola Company to the Supreme Court of the United States, where the judgment was affirmed. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1. The case was elaborately argued by counsel and thoroughly considered by the court, Mr. Justice FIELD delivering a very able and exhaustive dissenting opinion. The opinion of the court was delivered by Chief Justice WARRE, and is too lengthy to be quoted here. It was decided, however (in brief) that the said act of July 24, 1886, "to aid in the construction of telegraph lines," etc., was a legitimate and proper exercise by Congress of the power "to regulate commerce with foreign nations and among the several States," and "to establish post offices and post roads;" that the powers given to and accepted by the Western Union Telegraph Company cannot be obstructed by State legislation; and that said act extends not only to such post roads as are on the public domain, but to "any of the military or post roads of the United States which have been, or may hereafter be, declared such by act of Congress." The court say, among other things, as follows: "It is not necessary now to inquire whether Congress may assume the telegraph as part of the postal system, and exclude all others from its use. The present case is satisfied if we find that Congress has power, by appropriate legislation, to prevent the States from placing obstructions in the way of its usefulness." And the power of a State to tax its "franchise" to an unlimited extent would seem to be about as effective a means as could be imagined of "placing obstructions in the way of its usefulness."

But *Telegraph Co. v. Texas*, 105 U. S. 460, is still a more pointed case in favor of appellant's contention. In that case the Legislature of Texas had passed a statute providing that every telegraph company doing business in the State should pay a certain tax for every message sent by it; and the Western Union Telegraph Company, appellant in the case at bar, having refused to pay taxes under said statute, basing its defense on said act of Congress of July 24, 1866,—judgment had been recovered against it in the State court for the amount of such taxes. But on a writ of error the judgment was reversed. Here was a case almost impossible to be distinguished from *McCulloch v. Maryland*, 4 Wheat. 316. The court in its opinion, delivered by Chief Justice WAITE, among other things, say: "In *Pensacola Tel. Co. v. Western U. Tel. Co.*, 96 U. S. 1, this court held that the telegraph was an instrument of commerce, and that telegraph companies were subject to the regulating power of Congress in respect to their foreign and interstate business. A telegraph company occupies the same relation to commerce, as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself." The opinion then refers to rights held by the said telegraph company under the said act of Congress by which it became a "government agent;" and then, referring to the said tax attempted to be levied on its messages by the State of Texas, says: "As such, so far as it operates on private messages sent out of the State, it is a regulation of foreign and interstate commerce, and beyond the power of the State. That is fully established by the cases already cited. As to the government messages, it is a tax on *the means employed* by the government of the United States to exercise its constitutional powers, and therefore void. It was so decided in *McCulloch v. Maryland*, 4 Wheat. 316, and has never been doubted since." And thus in that case the Western Union Telegraph Company is put in exactly the same class with the United States Bank in *McCulloch v. Maryland*, 4 Wheat.

316. With respect to the last named case, we stated before that there was in principle no difference between a stamp tax on the notes of the United States Bank and a general tax upon its "franchise." But it is to be observed further on that subject that the statute of Maryland imposing the stamp tax provided that the bank "may relieve itself from the operation of the provision aforesaid by paying annually, in advance, to the treasurer of the Western Shore, for the use of the State, the sum of \$15,000." See act on page 319, 4 Wheaton's Rep. And so the bank might have avoided the purchase of stamped paper on which to issue its notes by simply paying a lump sum annually, and that would have been the paying of a tax upon its right to carry on its operations—upon its franchise. And if the court had seen any substantial difference between the two methods of accomplishing the same thing, it would have told the bank that it had no cause to complain of the *illegal* stamp tax, because that could have been avoided by the payment of the *legal* franchise tax. Suppose that the statute of Maryland had made no mention of a stamp tax, and had simply required the annual tax of \$15,000, does any one suppose that in such event the great opinion of Chief Justice MARSHALL would never have been written, to become the broad and sure foundation for subsequent judicial decision in the realm of constitutional law?

The only decision of the United States Supreme Court which can be invoked with any plausibility in favor of the validity of the tax here involved is to be found in the case of *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530. An analysis of the case, however, shows it to be entirely consistent with the decisions and views hereinbefore cited and expressed. In that case certain taxes levied against appellant herein, under certain statutes of the State of Massachusetts, were upheld; and it is true that in those statutes the words "corporate franchise" are used. But an examination of those statutes will show that the taxes there involved were levied upon the property of the com-

pany, and not upon its franchise; and the opinion delivered shows that such was the understanding of the court. When in a statute a certain thing is particularly described, so as to clearly identify it, the character of the thing is not changed by a misnomer. The Massachusetts statutes, with which the court was dealing, may be found in full on pages 531 to 535 of 125 U. S. They contain in detail a long and somewhat complicated plan for the assessment and taxation of corporations. The general scheme is that each corporation shall return annually to the tax commissioner the amount of its capital stock, with its par and market value, and also a list of structures, works, machinery, real estate, etc.; railroad and telegraph companies shall also return the whole length of their lines, and their length outside of the State; the commissioner is to ascertain from the returns, or otherwise, the true market value of the shares of the corporation, and to estimate therefrom the fair cash value of all of said shares constituting its capital stock; he is also to ascertain and determine the value and amount of all real estate, machinery, etc., owned by the corporation; then from the aggregate value of the shares of capital stock, ascertained as aforesaid, a great many deductions are to be made, and, in case of railroad and telegraph companies having lines running beyond the State, there is to be deducted "such portion of the whole value of their capital stock, ascertained as aforesaid, as is proportioned to the length of that part of their line lying without the commonwealth," and also an amount equal to the value of certain property located within the State, and subject to local taxation; and the corporation is to pay a tax on such part of the value of the capital stock as remains after all the deductions are made. It thus appears that these statutes — of which the foregoing is a mere summary — undertake to provide a just and equitable mode by which the taxable property of a corporation shall be ascertained, according to business principles and usual methods of valuation and appraisement; and that mode is radically and entirely different from the unlimited irresponsible taxation of a "fran-

chise," without regulation or condition, and without any necessary consideration of property values or recognized rules of assessment, such as we find in the case at bar. The tax under the Massachusetts statutes was a tax on *property*, and so the court clearly holds. Counsel for the telegraph company in that case argued that the tax was upon the franchise, and therefore void; and the court said upon that point as follows: "The argument is very much pressed that it is a tax upon the franchise of the company, which franchise being derived from the United States by virtue of the statutes above recited, cannot be taxed by a State; and counsel for appellant occasionally speak of the tax authorized by the law of Massachusetts upon this as well as all other corporations doing business within its territory, whether organized under its laws or not, as a tax upon their franchises. But by whatever name it may be called, *as described in the laws of Massachusetts*, it is essentially an excise upon the capital of the corporation. The laws of that commonwealth attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the *amount and value of the capital* so employed by it therein." The court further say that the rights conferred on the company by the said act of Congress do not exempt it from the "ordinary burdens of taxation," and that it is "liable upon its *real or personal property* as any other person would be;" and referring to *Telegraph Co. v. Texas, supra*, it quotes the expression of Chief Justice WAITE that "its *property* in the State is subject to taxation the same as other property." Again the court say: "The tax in the present case, though nominally upon the shares of the capital stock of the company, is, in effect, a tax upon that organization on account of *property* owned and used by it in the State of Massachusetts." We think, therefore, that the decision is clearly to the point that the thing there sought to be taxed, "as described in the laws of Massachusetts," was not "franchise," but property in the ordinary sense, "by whatever name it may be called."

Under this view the case is entirely consistent with those of *California v. Railroad Companies*, 127 U. S. 1, and with the Pensacola case and the Texas case, above cited; otherwise, it is impossible to reconcile it with those cases. Moreover, in the Massachusetts case, the statutes provided that if the telegraph company failed to pay the taxes, it should be enjoined from doing business, and the decree of the lower court had awarded an injunction; but the Supreme Court reversed that part of the decree, and held that the provision in the statutes for an injunction was, as against appellant, void, thus, in effect, recognizing the rights of the appellant under the said act of Congress as they had been declared in the other decisions hereinbefore cited. The case of *Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40, also cited by respondent, is the same practically, as the case in 125 U. S., which we have just been reviewing. It must be remembered that it has never been held in any of the cases that the *property* of a corporation holding national franchises was not subject to State taxation. In *McCulloch v. Maryland*, 4 Wheat. 316, the court say: "This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank in common with the other real property within the State."

From the foregoing decisions and views, we are of opinion that the taxes sought to be recovered in this case were beyond the power of the State to levy, and therefore void.

The judgment is reversed, with direction to the Superior Court to dismiss the action.

PATTERSON, J., HARRISON, J., GAROUTTE, J., and DE-HAVEN, J., concurred.

NOTE.—See note to next case.

Telegraph Cable Co. v. Adams.

POSTAL TELEGRAPH CABLE COMPANY v. WIET ADAMS,
State Revenue Agent.

Mississippi Supreme Court, Dec. 4, 1893.

(71 Miss. 555.)

TAXATION OF TELEGRAPH COMPANY.—INTERSTATE COMMERCE.

The imposition by a State of a privilege tax upon all telegraph companies having lines within the state and based upon the number of miles of such lines, in lieu of all other taxes, State, county or municipal, and amounting to less than an *ad valorem* tax on visible property of a given company, does not violate the constitutional rights of the company as an instrument of interstate commerce.

The following decisions of the United States Supreme Court, reported in this series, are cited in the opinion, and criticized as irreconcilable with each other: *Pensacola Tel. Co. v. W. U. Tel. Co.*, vol. 1, p. 250; *Tel. Co. v. Texas*, vol. 1, p. 378; *Leloup v. Port of Mobile*, vol. 2, p. 79; *W. U. Tel. Co. v. Atty.-Genl. of Mass.*, vol. 2, p. 57; *St. Louis v. W. U. Tel. Co.*, ante, p. 102.

APPEAL by defendant from judgment rendered by Circuit Court, Hinds county. Facts stated in opinion.

R. S. Guernsey, Mordecai & Gadsden and Brame & Alexander, for appellant.

Williamson & Potter, for appellee.

WOODS, J., delivered the opinion of the court: This action was instituted by the revenue agent of the State for the recovery of a privilege tax alleged to be due by the appellant for the years 1888 and 1889, under section 585, Code of 1880, and the amendment thereto contained in section 1, ch. 3, act of 1888. Under the statute thus amended, among other provisions, we find this language:

A tax on privileges is levied as follows, to wit : On each telegraph company operating 1,000 miles or more which shall be in lieu of other State, county or municipal taxes, \$3,000; * * * on each telegraph company operating less than 1,000 miles of wire, for each mile of wire, \$1.00.

The declaration alleges that the appellant operated, in the aggregate, during the years named, 391.28 miles of wire in the State of Mississippi, and was, therefore, under the statute, liable for a tax of \$391.28 for each year named.

It will be thus seen at once that this is a tax imposed upon a telegraph company, in lieu of all others, as a privilege tax, and its amount is graduated according to the amount and value of the property measured by miles. It is to be noticed that it is in lieu of all other taxes, State, county, municipal. The reasonableness of the imposition appears in the record, as shown by the second count of the declaration and its exhibits, whereby the appellant seems to be burdened in this way with a tax much less than that which would be produced if its property had been subjected to a single *ad valorem* tax.

The pleas bring in question the validity of our statute, and aver its conflict with the interstate commerce clause of the Constitution of the United States.

The record presents a federal question, and we acknowledge ourselves bound to follow the decisions of the court of last resort of the United States, if that court shall be found to have adjudicated it. Our difficulty arises from our inability to say with confidence what the Supreme Court of the United States has finally determined in cases of like character. The reported opinions of that court are so irreconcilable in their variances and seeming conflicts, in our view, that it is with diffidence that the impartial student can affirm what will or will not follow in any given state of case. If the line of decision adopted in *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Western Union Tel. Co. v. Texas*, 105 ib. 480; *Gloucester Ferry Co. v. Pennsylvania*, 114 ib. 196; *Pickard v. Pullman Southern Car Co.*, 117 ib. 34; *Robbins v. Taxing Dist.*, 120 ib. 489; *Leloup v. Port of Mobile*, 127 ib. 640;

Crutcher v. Kentucky, 141 ib. 47, stood alone, the settlement of the controversy in the case at bar would be made without great difficulty, in accordance with the contention of the appellant. But the numerous other cases, decided by the same great tribunal, in which was involved the same or like questions as are to be found in those just named, and in which contrary views seem to have been upheld, involves the controversy in much apparent, and, as we think, some real difficulty. If we had for our guidance only the other lines of decisions, embracing *State Tax on Railway Gross Receipts*, 15 Wall. 281; *Osborne v. Mobile*, 16 ib. 479; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365; *Western Union Tel. Co. v. Massachusetts*, 125 ib. 530; *Maine v. Grand Trunk Ry. Co.*, 142 ib. 217. *Ficklin v. Shelby County*, 145 ib. 1; *St. Louis v. Western Union Tel. Co.*, 148 ib. 92, the right of the revenue agent of the State to maintain this suit successfully would seem to be well established in accordance with the views of counsel for appellee.

If from generalization we descend to detail, the confusion that prevails in the decisions of the court whose lead we are bound to follow touching interstate commerce will be seen at once, and their confusion will deepen on protracted examination.

In the case of *Telegraph Co. v. Texas*, *supra*, Mr. Chief Justice WAITE, speaking for a unanimous court, said: "The Western Union Telegraph Company having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce and of a government agent for the transmission of messages on public business. Its property in the State is subject to taxation, the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and business." This very language of the then chief justice is quoted with approbation in *Telegraph Co. v. Massachusetts*, 125 U. S., by Mr. Justice MILLER, speaking for an undivided court. It is unqualifiedly declared in these two cases that the telegraph

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case of *Leloup v. Port of Mobile*,—indulges the remark that the *Osborne Case* would not be decided otherwise.

Again, in the case of *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, it was held that the transportation of passengers and freight for hire by a steam ferry across the Delaware river from New Jersey to Philadelphia by a New Jersey corporation is interstate commerce, and not subject to taxation by the State of Pennsylvania; while in *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, the court holds that the State has the power to impose a license fee upon ferry-keepers living in the State for boats which they own and use in conveying from a landing in the State, passengers and goods across a navigable river to a landing in another State.

Once more, *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34; *Leloup v. Mobile*, 127 U. S. 640; and *Norfolk & Southern Railroad Co. v. Pennsylvania*, 136 U. S. 114, in no doubtful terms deny to the States the right to impose a license tax on any agency employed, even partially, in interstate commerce; but, on the other hand, *Telegraph Co. v. Massachusetts*, 125 U. S. 530, and *Maine v. Grand Trunk Railway Co.*, 142 U. S. 217, unmistakably uphold a tax imposed upon a railway company engaged partially in interstate commerce, for the privilege of exercising its franchise. It is true the amount of these privilege taxes is arrived at by the ascertainment of the earnings of the railway company within the State, and by the ascertainment of the valuation of the property within the State, in the telegraph company case; but they are, by the very terms of the statutes of the two States imposing them, in the one case “an annual excise tax for the privilege of exercising its franchise in this State, which, with the tax provided for in section one, shall be in lieu of all taxes upon such railroad, its property and stock,” and, in the other, “a tax upon its corporate franchises at a valuation thereof equal to the aggregate value of the shares in its capital stock.” In the case of the *Telegraph Company v. Massachusetts*, 125 U. S., it is to be observed that the tax was not

upon the franchises of a domestic corporation, but upon those of a foreign one, the Western Union Telegraph Company, a New York corporation, and one employed in interstate commerce, and employed as a governmental agency also. It is no answer to the contention that these were privilege taxes, taxes upon the exercise of franchises, to assert that they were really taxes levied upon the property of the corporation. They are distinctly declared to be taxes on corporate franchises, taxes for the privilege of exercising corporate franchises, and the mere fact that the State adopted one method or another of fixing the amount of the tax is of no real value in the discussion. The question involved is not that of amount or method of ascertaining amount, but the validity of the tax itself, in any amount, ascertained in any way.

Are we mistaken in declaring that the decisions of the Supreme Court of the United States are not concordant on this most perplexing subject? We support ourselves in our perplexity by quoting the language of Mr. Justice MILLER in *Fargo v. Michigan*, 121 U. S. 230. Speaking on this very subject, the learned judge said: "With reference to the utterances of this court, until within a very short time past, as to what constitutes commerce among the several States, and as to what enactments by the State Legislature are in violation of the constitutional provision on that subject, it may be admitted that the court has not always employed the same language, and that all of the judges of the court who have written opinions for it may not have meant precisely the same thing." It appears to us that it is just and altogether decorous now to say that repeated and careful study of the decisions between 121 and 148 U. S. will warrant us also in again asserting that the language employed by the court in the more recent cases of this character has not been the same, and that the judges who have written the later opinions have not meant precisely the same thing. Unable, then, to say certainly what the judgment of the Supreme Court of the United States would be in the case in hand if presented to it, we feel at liberty to decide the controversy according to our own views of

what is right on the facts disclosed—views not unannounced in that tribunal whose final word is law.

This is the case of a foreign corporation admitted to the use and enjoyment of its corporate franchises in our State upon terms of perfect equality with all others. It is freely permitted to engage in the vast and various employments connected with its business; it has the use and enjoyment of the country highways of the State, and the streets of our villages, towns and cities, for the planting of its poles and the construction of its lines; and it has the care and protection of our laws and government. In return the State claims the right to treat it as she treats similar corporations chartered by her own authority. She asserts her authority to tax the exercise of its franchises in her midst as she does all others, domestic as well as foreign corporations. The State may tax its property as she does all other property of persons or corporations within her limits. She may tax the exercise of its franchises within her borders, and under the sheltering protection of her laws and government, and no foreign corporation may arrogantly assume any superiority over her domestic corporations. The privilege tax, the tax on the business, the occupation, the tax on the exercise of franchises, may be incidentally burdensome to interstate commerce. It does affect the business somewhat, and inevitably; but so does an *ad valorem* tax on the property employed in such commerce. It subtracts that much from the sum-total engaged in the traffic. So does the tax on gross receipts, as in the case of *State Tax on Railway Gross Receipts*, 15 Wall; so does the tax for the privilege of exercising its franchises by a railroad company in any State, ascertainable and determinable by the amount of its gross transportation receipts, scaled as required in *Maine v. Grand Trunk Railway Co.*, 142 U. S. Every tax is a burden, and to the extent imposed is an interference with the pursuit or business upon which it is laid. If the business is partially interstate commerce, then that commerce is incidentally affected and interfered with by every tax of any nature whatever that may be levied on it.

In the case at bar there is no direct burden upon interstate commerce. There is no further interference with it than will be found necessarily to result from the imposition of any burden of taxation in any shape. For the use and occupation of the public roads of this State, for protection of its laws and government in the exercise of its franchises, and as its reasonable and proper contribution for the support of the government whose care and shelter it enjoys, the State has imposed a privilege tax, ascertainable and determinable by the number of miles of wire in this State, in lieu of all other taxes, and in an amount less than an *ad valorem* tax on its visible property would yield. The appellant is reasonably required to pay what is called a privilege tax, but it is a tax in lieu of all *ad valorem* and other taxes, State, county and municipal, on property in this State. The State has chosen to impose a smaller burden than she might have done, unquestionably, if the property of the appellant had been subjected to the same rate of taxation as all other property whose *situs* is within her borders. By the imposition of a certain tax per mile on the lines wholly within her limits, the State secures from appellant that which appears certainly not to be a sum in excess of the amount which might have been imposed as an *ad valorem* tax. It seems to us that this position is supported by the opinions delivered and the results reached in *Osborne v. Mobile*, *Telegraph Company v. Massachusetts*, *Maine v. Grand Trunk Railway Company*, *Ficklin v. Shelby County*, and *St. Louis v. Western Union Telegraph Company*, not to mention others that collaterally yet powerfully tend in the same direction.

In the case at bar there is no taxation of messages, interstate and other; there is no exclusion or attempted exclusion by State law of a governmental agency, or a foreign corporation, partially engaged in interstate commerce; there is no taxation which interferes with, interrupts or burdens interstate commerce. There is a moderate, reasonable tax, called a privilege tax, but ascertainable and determinable by the amount, and necessarily by the value, of

the appellant's property, lying wholly in this State, imposed in lieu of all others; and this tax burdens and interferes with interstate commerce just as a tax on each telegraph pole does, as in the case of *St. Louis v. Western Union Telegraph Co.*; or as a tax on corporate franchises whose value is ascertainable and determinable by value of the shares of capital stock proportioned to the length of the telegraph lines in the State, as in *Telegraph Co. v. Massachusetts*; or as an annual tax for the privilege of exercising corporate franchises whose amount is to be determined by the gross transportation receipts, measured by the intrastate mileage compared with the total length of the railway within and without the State, as in *Maine v. Grand Trunk Railway Co.*

We adopt the language of Mr. Justice MILLER in delivering the opinion of the court in *Western Union Telegraph Co. v. Massachusetts*: "While the State could not interfere by any specific statute to prevent a corporation from placing its lines along their post roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefits of the laws of the State for the protection of its property and its rights is liable to be taxed upon its real and personal property as any other person would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of another State, and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support," and to this enlightened and just observation we unite the equally enlightened and just observation of Mr. Chief Justice WAITE in *Telegraph Co. v. Texas* (quoted with approbation in the long subsequent case of *Telegraph Co. v. Massachusetts*, 125 U. S.): "The Western Union Telegraph Company having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of

foreign and interstate commerce, and of a government agent for the transmission of messages on public business. Its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and business."

Affirmed.

NOTE.—In the case of *Wirt Adams, State Revenue Agent, v. Louisville, N. O. & Tex. Ry. Co.*, Mississippi Sup. Ct., Oct. 30, 1898 (15 So. R. 933), in which the same statute was under consideration as in the foregoing case, it was held that a railroad company which operated a telegraph line merely in connection with its train service, and not for profit, was not liable for taxation under the statute, as a "telegraph company operating * * * miles of wire."

The right of States to tax telegraph companies, as affected by the interstate commerce provisions of the Federal Constitution and by the post-roads act of Congress, which is the subject of the two last cases, is considered in notes at vol. 2, p. 89, and vol. 3, p. 7. See also INDEX to each volume of this series, titles "Constitutional Law," "Post-Roads Act."

MOORE V. CITY OF EUFAULA.

Supreme Court of Alabama, Dec. 15, 1898.

(97 Ala. 670.)

TELEGRAPH.—MUNICIPAL LICENSE FEE.—INTERSTATE COMMERCE.—POST-ROADS ACT.

A municipal ordinance requiring each telegraph company having an office or place of business within the city and engaged in the transmission of messages between points within the State, to pay a license tax, is not in conflict with the interstate commerce provisions of the Federal Constitution or void as to a telegraph company which has accepted the provisions of the post-roads act of Congress.

Cases of this series cited in opinion: *Laloup v. Port of Mobile*, vol. 2, p. 79; *Tel. Co. v. Texas*, vol. 1, p. 373.

APPEAL by defendant below, from judgment imposing fine for violation of city ordinance. Facts stated in opinion.

H. D. Clayton, for appellant.

G. L. Comer, for appellee.


COLEMAN, J.: Appellant, Moore, was fined for a violation of an ordinance of the city of Eufaula, which required of "each and every person or company engaging in the business of sending and receiving telegraphic messages to and from points within the State of Alabama, and keeping an office or place of business in the city of Eufaula, to pay a license tax," etc.

The plea of the defendant to the complaint is substantially the same as that pleaded by the defendant in the case of *Leloup v. Port of Mobile*, 127 U. S. 640, and it is insisted that the principle of law declared in that case is applicable to the present case, and is conclusive against the validity of the ordinance for a violation of which the defendant was prosecuted. We are of opinion that the ordinance under which the prosecution in the former case was had is essentially different from that to be considered in the case at bar in its application to the facts. Congress has exclusive power in all matters of interstate commerce, and the authority of the States in all matters of commerce purely domestic is equally sovereign and exclusive. Communication by telegraph is commerce, and, when carried on with foreign nations, and among the several States, and with the Indian tribes, Congress alone has power to regulate it. The principle of exclusive authority of Congress to regulate commerce has been extended until it is made to apply to all connecting lines used for the transmission of communications from one State to another, although such connecting lines may lie wholly within a single State. Congress also has exclusive power to establish post-offices and post-roads. Any law of a State which obstructs or burdens interstate commerce, or hinders the regular and legal administration of the general government, must be held to be unconstitutional and void. The power of the State over its internal affairs is subject to no limitation outside of the Constitution.

of the United States. The Western Union Telegraph Company, incorporated by the State of New York, can derive no power from its creator to do business within the jurisdiction of the State of Alabama. Considered purely as a foreign corporate body, deriving its powers from a charter granted by the State of New York, the State of Alabama has the power to prescribe police regulations for its government within its boundaries, and to tax its property situated here for the purpose of revenue, having due regard that no unjust discrimination be made. The complaint avers that the defendant, "as managing agent of the Western Union Telegraph Company, a corporation having a place of business in the said city of Eufaula, did then and there, as such agent, engage in the business and occupation of transmitting telegrams from and to points within the State of Alabama, and between the private individuals of the State of Alabama and others within said State," etc.

The defense set up in the plea to the charge in effect asserts the proposition that, inasmuch as the telegraph company has accepted the benefit of the act of Congress set out in the plea, and subjected itself to its conditions, and may, therefore, be used by the government for the administration of public affairs, or inasmuch as by its various connections with lines in other States it may be used for purposes of interstate commerce, therefore the telegraph company, though a foreign corporation, has the right, in violation of the State laws, to engage in other matters and business wholly independent of and disconnected from governmental administration and interstate commerce.

The boundary line of the power granted to Congress by the Constitution, "to regulate commerce between the States," has not been clearly and definitely located by the decisions of the Supreme Court of the United States. Whether, eventually, this clause of the Constitution or some other will be extended by judicial interpretation until the autonomy of the States and the doctrine of State sovereignty shall be known only as a part of the past history of our country presents questions of great solicitude to those who love and



glory in the general government as originally designed and established. We believe, however, that as yet no decision has gone to the extent of granting immunity even to the officers of the government, who are guilty of violating police regulations of a State which in no way militate against the performance of official duty required by the general government. Much less can one claim immunity who was not an employe of the government, and who was not engaged in official duty at the time of the breach of its laws of which the State complains.

The ordinance of the city of Eufaula can be enforced without interfering with interstate commerce, or the rights of the general government, secured to it under the act of Congress set up in the plea of the defendant. The State of Alabama, by virtue of its sovereign power, had authority to grant to the city of Eufaula the power to adopt the ordinance. The plea filed does not meet the issue presented by the complaint. To present a defense, it should aver facts to show that the messages transmitted were in the interest of interstate commerce, or in obedience to governmental orders, and that the office or place of business in the city of Eufaula was kept and used for these purposes only. The fact that the Western Union Telegraph Company may keep an office and engage in a business in the city of Eufaula over which the State has no police control does not justify it in using the office for other purposes, and engaging in other business, subject to State regulation, and for the doing of which the State requires that a license shall be first taken out. If the defendant had been charged with retailing without a license and contrary to law, the plea would be equally available as a defense as it is to the charge that the defendant engaged in the business of transmitting messages from and to points within the State, and from and to private individuals of the State.

We feel fully sustained in our views by the line of argument and conclusions reached in the following cases: *Wes. Un. Tel. Co. v. The State of Texas*, 105 U. S. 460-466; *Ficklin v. Taxing Dis., Shelby Co.*, U. S. Rep.,

decided April 11, 1892; *State of Maine v. Grand Trunk R. R. Co.*, U. S. Rep., decided Dec. 14th, 1891.

There was no error in sustaining the demurrer to the plea of the defendant.

Affirmed.

ON REHEARING.

The appellant has applied for a rehearing in this case. It is contended in the written argument for a rehearing that, in addition to the question of interstate commerce, defendant's pleas that defendant "did business on the post-roads of the United States only; and that it had duly filed with the postmaster-general its acceptance of the restrictions and obligations of the act of Congress, approved July 24, 1868, and that Congress, having the company to do its business upon the post-roads of the United States, the State cannot impose any restrictions upon the exercise of the rights conferred;" and, further, "That the Western Union Telegraph Company is part of the postal system—a postal agent of the United States, and that by reason thereof, the State can not demand a license of the company for maintaining and operating its line of telegraph and doing business required by such act of Congress," etc.

These questions we understand to be fully disposed of by the principles declared in the opinion. The act of Congress referred to is set out in the pleas. We regard only the averments of conclusions of the pleader, which are properly authorized by the act as well pleaded. The opinion which we are asked to reconsider distinctly declares: "That Congress has exclusive power to establish post-offices and post-roads. Any law of a State which obstructs or burdens interstate commerce, or hinders the regular and legal administration of the general government, in its application, must be held to be unconstitutional and void." It is unnecessary to repeat the complaint against the defendant. As stated before, neither of the pleas presents a defense to the complaint. They do not show that the act of the defendant complained of was done in the prosecution

Telegraph Co. v. City Council et al.

of business in the interest of the general government, such as the government has the right to demand of it under the act of Congress set out in the pleas. The former opinion was well considered, and we are satisfied with the correctness of our conclusion.

Rehearing denied.

NOTE.—See note to *W. U. Tel. Co. v. City of Fremont*, post.

**WESTERN UNION TELEGRAPH COMPANY V. CITY COUNCIL
OF CHARLESTON ET AL.**

POSTAL TELEGRAPH CABLE COMPANY V. SAME.

Circuit Court, D. South Carolina, June 21, 1892.

In Equity.

(56 Fed. Rep. 419.)

**TELEGRAPH COMPANY.—MUNICIPAL LICENSE FEE.—INTERSTATE COMMERCE.
—JURISDICTION OF FEDERAL COURTS.**

A telegraph company which has accepted the provisions of the "Post-roads act" of Congress is a federal agent and may bring suit in federal courts for injunction to prevent illegal taxation, irrespective of the amount in controversy.

A municipal ordinance imposed a license fee upon telegraph companies, excluding business done for the general government and interstate business. Held, to impose a tax, and to be valid on account of the specified exception.

Cases of this series cited in opinion: *Tel. Co. v. Texas*, vol. 1, p. 373; *W. U. Tel. Co. v. Alabama State Board*, vol. 8, p. 1; *W. U. Tel. Co. v. Atty.-Genl.*, vol. 2, p. 57.

BILLS for injunction to restrain collection of taxes. Facts stated in opinion.

Smythe & Lee and *Mordecai & Gadsden*, for complainants.

Charles Inglesby, for defendants.

SIMONTON, District Judge: These two cases, covering precisely the same averments and issues, were heard together. The complainants are corporations, each organized under the laws of New York. Each of them has an office in the city of Charleston, and each is engaged in sending messages by wire to points in the United States, to points outside of this State, and in other countries on this continent, and is connected by cable with the old world. Each of them is thus an instrument of and engaged in interstate commerce. Besides this, each of them, having its lines over the post-roads, highways and railroads in the city of Charleston, State of South Carolina, and in others of the United States, has accepted the provisions of the act of Congress, approved 24th July, 1866, to aid in the construction of telegraph lines. By this action the company so accepting puts its line at the service of the United States for postal, military, and other purposes, and gives precedence to its messages over all other business. It thus becomes an agent of the government. The bills, having made statements to this effect, proceed to say that the city council of Charleston, assuming to act under an act of the General Assembly of South Carolina, passed an ordinance to regulate licenses for the year 1892; that by this ordinance all persons engaged in business of the kinds thereafter set forth as a condition precedent for carrying on such business are required to prepare a statement for the city assessors, each giving his name, place of business, and amount of business for the fiscal year, for the purpose of assessment of the license tax; that, if he fail so to do, the city assessor shall proceed to assess him the amount provided in the ordinance, and to add thereto a penalty of 50 per cent.; that he shall report this to the city treasurer, who shall then issue his warrant for the collection of the same, and place the same in the hands of the city sheriff for distress or levy, adding 5 per cent. for his fees; that each of the complainants decided not to make, and in fact did not

make, any such statement or apply for such license, whereupon the city assessor assessed each of them \$500, and added thereto the penalty of 50 per cent., and reported the same to the city treasurer, who issued thereon his warrant, and placed the same in the hands of the city sheriff, who now threatens to levy upon the property of the telegraph companies. Each complaint avers that the demand for this license and penalty is illegal and void; that the mode of enforcing the demand will interfere with and destroy the business of the company, rendering it incapable of performing its functions as an agent of the government or an instrument of interstate commerce, and prays an injunction. A temporary injunction was issued. The defendant filed an answer. At the hearing, a motion was made to dismiss the bills for want of jurisdiction, the amount in controversy not exceeding \$2,000, besides interest and costs. To this motion complainants reply that each of them is a government agent of the United States, and, as such, entitled to seek relief in this court, without regard to the amount in controversy; and that the amount in controversy does not exceed the limit prescribed by the act of Congress, and thus the diversity of citizenship would sustain the jurisdiction. This motion, like a demurrer, admits, for the purposes of the motion, the allegations of the bill. As agencies of the government, these companies, in all matters affecting their existence as such agents, have a right to come into this court, without regard to the amount in controversy. *Yardley v. Dickson*, 47 Fed. Rep. 835; *U. S. v. Shaw*, 39 Fed. Rep. 435. It would seem also that the jurisdiction can be maintained on the other ground. The value of the object to be gained fixes the amount in controversy for jurisdictional purposes. Fost. Fed. Pr., § 16. The object to be gained here is exemption from a license tax of \$500 per annum. An injunction in a case like this must be of much greater value to the complainant than the sum immediately demanded. *Symonds v. Greene*, 28 Fed. Rep. 834; *Whitman v. Hubbell*, 30 Fed. Rep. 81; *Railroad Co. v. Kuteman*, 54 Fed. Rep. 552;

Railroad Co. v. Ward, 2 Black, 485. If irreparable injury in the destruction of its right to conduct this business is alleged to be a valuable franchise, it is said, is threatened to the jurisdiction is overruled. The provisions of the ordinance to be construed are those requiring that no license be taken out by any person, firm, company, or corporation engaged or engaging in business in the city of Charleston upon statement made of the amount of the license, and upon which the city assessor shall assess the price of the license, also the imposition of a penalty for each day of non-compliance on such as fail to comply with the ordinance. The amount of this penalty on each of the companies failing to comply with this item in the ordinance, is as follows:

35 telegraph companies or agencies, each, for doing business within the city of Charleston, and not including any companies operating from points without the State, and not including any companies in the government of the United States, its officers or agents.

The first question which arises naturally is, whether a license, a condition upon the performance of a right to do business depends, and to whom the right to do business is referred, or is it a tax? This question was answered in *Home Ins. Co. v. City Council*. The State of Georgia required all foreign insurance companies as a condition precedent for doing business in the State, to get a certificate from the comptroller of the State to be issued upon the sworn statement of the company of the amount of capital in the act. The Home Insurance Company had such a certificate. The city of Augusta passed an ordinance requiring all insurance companies to get a license annually, and pay a certain sum for the same. The Home Insurance Company disobeyed this ordinance, and denied the necessity of it. The counsel for the company, leaders of the bar, contended before the Supreme Court that "license" means "permission" or "authorization," and not a right given by some competent authority.

which without such authority would be illegal; that, having the right to do the business of insurance from its charter, and the permission to do its business in the State of Georgia from the act of its Legislature, a license from the city of Augusta was unnecessary, and its requirement unlawful. The Supreme Court replied to this argument, and overruled it. They held that the payment required was a special tax, although called a "license," levied in the mode prescribed; that the penalty was a mode of enforcing its payment; and that the license, when issued, was only a receipt for the tax. In *Wiggins Ferry Co. v. City of East St. Louis*, 107 U. S. 376 (2 Sup. Ct. Rep. 257), the same court, discussing the right of a city to require a license from a ferryman whose ferries crossed a navigable stream dividing two States, take the same view, and sustained the tax against the contention that it interfered with interstate commerce. "The exaction of a license fee is an ordinary exercise of the police power by a municipal corporation." "The power of the State to authorize any city within its limits to enforce a license tax on trades or callings generally, especially those which are '*quasi* public,' cannot be disputed." "Whether a license fee is exacted under the power to regulate or the power to tax is a matter of indifference, if the power to do either exists." In South Carolina the same point is decided, and the license tax sustained in *State v. Hayne*, 4 S. C. 403; *State v. Columbia*, 6 S. C. 1.

This being a tax, are these agents of the government and instruments of interstate commerce subject to the tax? The tax is one for business done exclusively within the city of Charleston. The business is the receiving and sending of messages by wire. As this is the controlling initial point of messages sent, and the concluding, consummating point of messages delivered, these words, without qualification, cover all messages sent and received. A shipping and commission merchant may be said to do his business exclusively in Charleston, when he ships goods from and receives goods at this port, although, to complete such busi-

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Telegraph Co. v. Fremont.

payment imperil or tax the existence of either of the companies, or its business in this city.

The temporary injunction heretofore granted is dissolved in each case, the motions for injunction refused, and each bill is dismissed, with costs.

NOTE.— See note to next case.

THE WESTERN UNION TELEGRAPH COMPANY V. THE
CITY OF FREMONT.

Nebraska Supreme Court, March 20, 1894.

(39 Neb. 692.)

TELEGRAPH COMPANIES.— MUNICIPAL TAX.— INTERSTATE COMMERCE.

(Head-note by the court):

Under section 52, c. 14, art. 2, Comp. St. 1891, each city of the second class having more than 5,000 inhabitants has the power to levy a tax upon every business or occupation carried on within the territorial limits of the municipality, excepting alone those enumerated in the proviso clause of said section.

Municipal authorities are powerless to license or tax any business or avocation conducted exclusively outside of the municipality.

A city of the above class may lawfully enact an ordinance imposing on telegraph companies a license tax of a reasonable sum per annum for the privilege of transacting the business of telegraphy within the city; and the fact that the telegrams received and delivered within the city were transmitted over the lines of the telegraph company from other points within the State, or that the messages received by it at its office or place of business in the city were transmitted to various other places in the State, does not invalidate the tax.*

State and municipal authorities are powerless to impose a tax upon messages to or from other States, since such a tax would be in conflict with that clause of the Federal Constitution which gives to Congress the exclusive power to regulate commerce among the several States.

Where a telegraph company is engaged in both interstate and intrastate business, an ordinance levying an occupation tax on that portion of such

* NOTE.— IRVINE, C., dissented as to this, which was the real point in the case; he maintaining that the city could levy its tax only as to messages received and to be delivered within the city.

business which is carried on wholly within the State is not repugnant to section 8, art. 1, of the Constitution of the United States, since it in no way interferes with or regulates interstate commerce.

An occupation tax may be collected by ordinary suit where the ordinance imposing the tax so provides.

Cases of this series cited in opinion: *Pensacola Tel. Co. v. W. U. Tel. Co.*, vol. 1, p. 350; *Tel. Co. v. Texas*, vol. 1, p. 373; *W. U. Tel. Co. v. Alabama State Board*, vol. 1, p. 344; *W. U. Tel. Co. v. Pennsylvania*, vol. 1, p. 756; *Leloup v. Port of Mobile*, vol. 2, p. 79; *Batterman v. W. U. Tel. Co.*, vol. 2, p. 63.

APPEAL by defendant from judgment of District Court, Dodge county, in an action for the recovery of an occupation tax. Facts stated in opinion.

Estabrook & Davis, for plaintiff in error.

F. Dolezal, city attorney, for defendant in error.

NORVAL, C. J.: This was an action by the city of Fremont to recover from the plaintiff in error an occupation tax levied under and in pursuance of an ordinance of said city. A general demurrer to the petition was overruled, and, the telegraph company having elected to stand upon its demurrer, judgment was entered by the court in favor of the city for \$150 and costs of suit. The petition, after alleging the incorporation of plaintiff and defendant, avers, in substance, that on the 1st day of April, 1891, and continuously ever since said day, there was, and now is, conducted and carried on within the corporate limits of said city of Fremont, by various persons and corporations, the business and occupation of receiving, transmitting and delivering telegraph messages, not including the receipt, transmission or delivery to or from any department, agency or agent of the United States, and not including the receipt, transmission or delivery of any message which is interstate commerce; that on the 23rd day of April, 1891, the duly constituted authorities of the city of Fremont, in the manner provided by law, duly passed and adopted an occupation tax ordinance, a copy of which is attached to the peti-

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tion ; that said ordinance was duly approved by the mayor of said city, and published as required by statute, and ever since continuously has been, and now is, in full force and effect—by which said ordinance a license tax of \$150 per annum was levied upon the aforesaid business and occupation, and it became and was the duty of each person and corporation engaged therein within said city to pay such tax ; that the defendant, on the date aforesaid, and prior thereto, and continuously ever since, was and is engaged in and carrying on, within the territorial limits of said city, the business and occupation specified in paragraph No. 1 of section 1 of said ordinance ; that there was due the plaintiff from said defendant on the date last aforesaid the sum of \$150, as a license tax on its said business and occupation, no part of which has been paid, although the payment of said sum has been requested by the city, and refused by the defendant. It is further alleged in the petition “that besides the business and occupation aforesaid, and in addition thereto, the said defendant at the time aforesaid was, and has since continuously been, engaged in the business of sending and receiving messages by telegraph which are interstate commerce in said city, and said defendant had theretofore duly accepted the terms of the act of Congress passed in the year 1866 relating to telegraphs and telegraph companies, and was and is entitled to all the benefits of said act, and has availed itself of all the benefits of said act, and performed its duties thereunder, and has telegraph lines extending throughout the several States of the United States, and to and from and among said several States, all of which said lines said defendant operates and operated during all the aforesaid times by the transmission by means of said telegraph lines of telegraph messages ; that, for and during the several years herein mentioned, under the laws of this State, there has been assessed, and defendant has paid, property tax on the lines, poles, instruments, realty, and office furniture and stationery supplies that said defendant owns and has located and kept within the State of Nebraska, which said tax

It will be observed that the foregoing section authorizes cities of the class of the city of Fremont to impose a tax upon every business and occupation carried on within the territorial limits of the municipality, excepting only those mentioned in the proviso clause of the section quoted. The tax must be reasonable and not burdensome, as well as uniform in respect to the class upon which the same is levied. No question, however, is raised as to the reasonableness of the tax sought to be collected by this action. The Legislature has not vested municipal corporations with authority to license or tax any business or occupation carried on exclusively outside of the municipality. There can be no doubt of it. The language of the statute is, "on any occupation or business within the limits of the city." It is argued that the ordinance before us levies a tax on the business of plaintiff in error which is not carried on within the boundaries of the city of Fremont. If this be true, the tax is invalid for the want of power in the municipality to impose it. But such is not the scope and effect of the ordinance, since it does not attempt to tax the business of telegraphy, which is conducted wholly outside of the corporate limits of the city, but is restricted to such portion of that business as is entirely within the limits of the municipality. It further excludes government messages, and messages which are interstate commerce. It is the business and occupation, only, of receiving, delivering, and transmitting messages within the city which is sought to be taxed by the ordinance. The fact that the telegrams received and delivered by plaintiff in error within the city of Fremont were transmitted over its lines from other points within the State, or that the messages received by it at its office or place of business in Fremont are transmitted to various other places in the State, does not invalidate the tax. It is that portion of the business alone which telegraph companies transact in the city, upon which a license tax is levied by the ordinance. The petition expressly avers, which the demurrer admits to be true, that plaintiff in error was and is engaged in carrying on, within the corporate limits of said

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city, the business and occupation described in paragraph 1 of the ordinance under consideration. Plaintiff in error is therefore carrying on a business or occupation in the city of Fremont, within the meaning of the statute, and is liable to the license tax imposed by the municipal authorities.

Sacramento v. Stage Co., 12 Cal. 134, was an action for the recovery of a license tax levied by an ordinance of the city of Sacramento upon stage companies engaged in the business of carrying passengers to and from Sacramento city. It was claimed there, as here, that the ordinance was invalid because it authorized the imposition of a tax upon a business not carried on entirely within the city limits. The ordinance and the tax levied thereunder were sustained. BALDWIN, J., speaking for the court, says: "The question is made whether, inasmuch as the larger portion of this work of transportation is done without the territorial limits of the city, the authorities have a right to levy the tax upon them; and on this question we have no doubt. The company receive and discharge their passengers, and make contracts here for their conveyance, and they have their offices and property here, within the protection of the municipal laws. The mere fact that the business of carrying the passengers is not within the municipal limits does not make the receiving and discharging of them, and the contracting for them, less a business here. If this business is not a business in Sacramento, it is difficult to say where it is." The principle announced in the above case was recognized and applied by the same court in *City of Los Angeles v. Southern Pac. R. Co.*, 61 Cal. 59. In that case the ordinance of the city of Los Angeles levied a license tax of \$60 on every steam railroad company having a depot in said city. The court, in passing upon the case, say: "The fact that the business of defendant extended beyond the city limits does not relieve it from the payment of a license tax for conducting its business within the city. *Sacramento v. Stage Co.*, 12 Cal. 134. Defendant is subject to regulation in many respects by the State, yet it is



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doing a business in Los Angeles, which, with its property there situate, is protected by local authorities. It is interested in many police expenditures, and may as reasonably be charged local license as may those engaged in other business."

It is difficult to perceive a distinction in principle between the cases above referred to and the question before us. These authorities, it seems to us, are directly in point, and sustain the authority of the defendant in error to impose a specific license tax upon the telegraph company for conducting its business within the corporate limits of the city of Fremont. Similar taxes have often been levied on avocations and callings where a portion of the business is transacted and carried on outside of the territorial jurisdiction of the city imposing the same. Physicians and lawyers are frequently called upon to pay an occupation tax, yet the persons belonging to either of these professions transact a large portion of their business outside of the city in which their offices are located. The same is likewise true of wholesale dealers, livery men, contractors and builders, — also, persons engaged in other callings which could be mentioned — and will it be contended that the license tax levied upon either of the occupations or pursuits named would be invalid? Clearly it would be, if the tax in the case at bar cannot be sustained. In *Com. v. Stodder*, 2 Cush. 562, cited in the brief of counsel for plaintiff in error, the opinion of the court contains language directly opposed to the holding of the California court in the cases above cited, and from which we have quoted, but the reasoning of the Massachusetts court is unsatisfactory; besides, the statute under which the ordinance there considered was adopted is quite different from the one governing the city of Fremont. The Massachusetts statute authorized the mayor and aldermen of the city of Boston to adopt rules and orders "for the due regulation, in such city, of omnibuses, stages," etc. The title of the act was, "An act to prevent obstructions in the streets of cities and to regulate hackney coaches and other vehicles." It was held that the power

conferred was not a tax-levying power, but that "all the apparent object of the act may be secured by due regulations as to the time, place, and mode of using such vehicles, irrespective of any payment of a special duty or tax upon them as provided in the ordinance." Since the statute there under review conferred no power upon the municipality to levy an occupation tax upon omnibuses and stage coaches, it is obvious that what the court say about want of authority of the city of Boston to require the proprietors of omnibuses and other vehicles running into and out of Boston to pay a license tax was not necessary to a decision of the case before the court.

In the case at bar, it is urged that the ordinance we have been considering does not impose a license tax; therefore, the tax in question is invalid. The charter of the city of Fremont authorizes the levying and collecting "a license tax." Section 1 of the ordinance declares that "there is hereby levied a license tax on each and every occupation and business within the limits of the city," etc. The ordinance, therefore, does levy a "license tax." That the ordinance makes no provision for the issuance of a formal license is immaterial. By section 5 the city treasurer is required to give a receipt to the person paying the tax, "properly dated and specifying the person paying, the occupation, amount, and for what time said tax is paid." It is not believed that a provision for the issuance of a license is essential to the validity of the tax, but, if it were, the receipt provided for in section 5 is a sufficient compliance. It will be observed that the ordinance authorizes the collection of occupation taxes levied thereunder by suit in any court of competent jurisdiction. That the payment of such taxes may be enforced by an ordinary action of law, when the ordinance provides for the collection in that manner, we do not doubt. *Sacramento v. Crocker*, 16 Cal. 119; *City of Los Angeles v. Southern Pacific R. Co.*, *supra*.

It is further urged by counsel for the telegraph company that the ordinance imposes a burden upon interstate commerce, and consequently is repugnant to that clause of the

federal Constitution which gives to Congress the power to regulate commerce with foreign nations and among the several States. The power to regulate interstate commerce is within the exclusive power of Congress, and it is well settled, by the repeated decisions of the highest judicial tribunal of the land, that a State law which imposes regulations or restrictions which operate to hinder or embarrass the speedy transportation of commerce between the States, is unconstitutional and void. It has likewise been decided that the telegraph is an instrument of commerce, and that the power to regulate telegraph companies in respect to interstate business is invested in Congress alone. In other words, the States are powerless to impose a tax upon messages where communications are transmitted from one State to another. *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1; *W. U. Tel. Co. v. Texas*, 105 U. S. 460; *W. U. Tel. Co. v. Alabama State Board*, 132 U. S. 472 (10 Sup. Ct. 161).

The Supreme Court of the United States, in more than one case, has said that a State may lawfully impose a tax upon a telegraph company for telegrams carried wholly within the limits of the State in which such tax is levied. We will now refer to some of the decisions of that tribunal so holding. In *W. U. Tel. Co. v. Texas*, *supra*, the question under consideration was the validity of a statute of Texas, requiring telegraph companies doing business in the State to pay tax upon each telegram passing over their lines, whether wholly within the limits of the State, or coming into the State from a point without, or going from the State out of it. The statute was held void in so far as it related to messages carried through more than one State, as an interference with or a regulation of commerce among the States.

It was further decided that the State had the power to levy a tax on telegrams carried entirely within the limits of the State. Chief Justice WAITE, in delivering the opinion of the court in that case, said: "The Western Union Telegraph Company, having accepted the restrictions and

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obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business. Its property in the State is subject to taxation, the same as other property, and may undoubtedly be taxed in a proper way on account of its occupation and its business. The precise question now presented is whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the State, or sent by public officers on the business of the United States." The learned Chief Justice, in the same opinion, after holding that the tax on telegraph messages sent from points without the State to points within, and from points within to points without, is a regulation of interstate commerce, and therefore void, uses the following language: "The rule that the regulation of commerce, which is confined exclusively within the jurisdiction and territory of a State, and does not affect other nations or States or the Indian tribes—that is to say, the purely internal commerce of a State—belongs exclusively to the State, is as well settled as that the regulation of commerce which does affect other nations or States or the Indian tribes belongs to Congress. Any tax, therefore, which the State may put on messages sent by private parties, and not by the agents of the government of the United States, from one place to another, exclusively within its own jurisdiction, will not be repugnant to the Constitution of the United States." To the same effect is *W. U. Tel. Co. v. Pennsylvania*, 128 U. S. 39 (9 Sup. Ct. 6). In *Leloup v. Port of Mobile*, 127 U. S. 640 (8 Sup. Ct. 1380), it was ruled that "telegraphic communications when carried on between different States are interstate commerce, and within the power of regulation conferred upon Congress, and that a general occupation tax on a telegraph company affects its entire business, interstate as well as domestic, and is unconstitutional." In that case a tax ordinance of the city of Mobile imposed a license tax of \$1,225 on each telegraph company for the privilege of transacting tele-

graph business in the city. It is clear that the ordinance is repugnant to the commercial clause of the federal Constitution, since it was a restriction upon interstate commerce. In that case, the tax was levied upon its entire business, interstate as well as that carried on wholly within the State, while in the case at bar the tax was upon interstate business alone. In the case referred to, the right of the State to tax the telegraph company's interstate business was stated. In *Ratterman v. Telegraph Co.*, 127 U. S. 411 (8 Sup. Ct. 1127), it was held "that a single tax, assessed under the Revised Statutes of Ohio, upon the receipts of a telegraph company which were derived partly from interstate commerce and partly from commerce within the State, but which were returned and assessed in gross, and without separation or apportionment, is not wholly invalid, but is invalid only in proportion to the extent that such receipts were derived from interstate commerce." See *W. U. Tel. Co. v. Alabama State Board*, 132 U. S. 472 (10 Sup. Ct. 161.) In the *State Freight Tax*, 15 Wall. 232, the court had under consideration a statute of the State of Pennsylvania which provided for a tax upon all freight carried by any railroad or canal in the State. The Reading Railroad Company resisted the tax, claiming that it was levied on interstate commerce. The Supreme Court of the United States held that the tax on the freight transported wholly within the State was valid, but that such freight as was brought into or carried out of the State, being interstate commerce, was not subject to State taxation. The Legislature of the State of Missouri, in 1889, enacted a law imposing a tax upon express companies of 2 per cent. of their "receipts for business done within the State." Under the provisions of said law, taxes were assessed against the Pacific Express Company, a Nebraska corporation, carrying on business as an express company in the State of Missouri and several other States. The express company brought suit in the Circuit Court of the United States for the district of Missouri, to restrain the collection of said tax, alleging, among other grounds, that

the statute of Missouri above mentioned imposed a tax upon interstate commerce, and therefore infringed the Constitution of the United States. The court, by CALDWELL, J., held that the tax was not a regulation of, or an interference with, interstate commerce. *Express Co. v. Seibert*, 44 Fed. Rep. 310. An appeal was prosecuted to the Supreme Court of the United States, where the decree was affirmed, the opinion being reported in 142 U. S. 339 (12 Sup. Ct. 250). Mr. Justice LAMAR, speaking for the court, used this language: "The first proposition, that the statute imposes a tax upon interstate commerce, and is therefore violative of what is known as the commercial clause of the Constitution, is unsound. It is well settled that a State cannot lay a tax upon interstate commerce in any form, whether by way of duties laid down on the transportation of the subjects of that commerce, or the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it which belongs to Congress. *Lyng v. Michigan*, 135 U. S. 161 (10 Sup. Ct. 725); *Leloup v. Port of Mobile*, 127 U. S. 640 (8 Sup. Ct. 1380); *W. U. Tel. Co. v. Alabama State Board*, 132 U. S. 472 (10 Sup. Ct. 161); *McCall v. California*, 136 U. S. 104 (10 Sup. Ct. 881); *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114 (10 Sup. Ct. 958).

The question on this branch of the case, therefore, is, was the business of this express company in the State of Missouri, on the receipts from which the tax in question was assessed under this act, interstate commerce? The allegation of the bill is very positive that, in the prosecution of its business as an express company, the complainant is engaged, in part, in the transportation of goods and other property between the States of Nebraska, Kansas, Texas, and other States of the Union, and the State of Missouri, and also in the business of carrying goods between different points within the limits of the State of Missouri. The question on this point, therefore, is narrowed down to the single inquiry, whether the tax complained of in any way

bears upon or touches the interstate traffic of the company, or whether, on the other hand, it is confined to its intrastate business. We think a proper construction of the statute confines the tax which it creates to the intrastate business, and in no way relates to the interstate business of the company. The act in question, after defining in its first section what shall constitute an express company, or what shall be deemed to be such in the sense of the act, requires such express company to file with the State auditor an annual report, "showing the entire receipts for business done within this State of each agent of such company doing business in this State," etc., and further provides that the amount which any express company pays "to the railroads or steamboats within this State for the transportation of their freight within this State," may be deducted from the gross receipts of the company on such business; and the act also requires the company making a statement of its receipts to include, as such, all sums earned or charged "for the business done within this State," etc. It is manifest that these provisions of the statute, so far from imposing a tax upon the receipts derived from the transportation of goods between other States and the State of Missouri, expressly limited the tax to receipts for the sums earned and charged for the business done within the State. This positive and oft-repeated limitation to business done within the State,—that is, business begun and ended within the State,—evidently intended to exclude, and the language employed certainly does exclude, the idea that the tax is to be imposed upon the interstate business of the company. "Business done within this State" cannot be made to mean business done between that State and other States. We therefore concur in the view of the court below, that it was not the legislative intention, in the enactment of this statute, to impinge upon interstate commerce, or to interfere with it in any way whatever; and that the statute, when fairly construed, does not in any manner interfere with interstate commerce.

The principle deducible from these decisions is that,

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while the State cannot tax either the interstate or government business of a telegraph company, it possesses the power to impose a tax upon such business of such company as is carried on wholly within the State, provided such tax is not levied in gross upon State as well as interstate business, but is restricted to intrastate business solely. And in view of the foregoing authorities, and especially the last one quoted from, we have no hesitation in holding that the ordinance of the city of Fremont in no manner places a burden or restriction upon interstate commerce, nor does it tax the agency of the federal government. The ordinance expressly excludes from its operation all government and interstate business. The plaintiff in error could transmit messages relating to government business and carry communications from this State to points in other States to persons and places without this State, unmolested, and without paying to the city of Fremont a cent as license tax therefor. The only difference between this case and *Express Co. v. Seibert, supra*, is this: In the latter, the tax levied was a certain per cent. on the gross amount of the receipts of the express company derived from the business done by it within the State; while here a specified sum was imposed upon telegraph companies for the privilege of transacting within the city of Fremont intrastate business. The case cited is directly in point on the question before us, and must control our decision herein. The judgment of the District Court is right, and is therefore affirmed.

Affirmed.

NOTE.—The three foregoing cases, in which the validity of ordinance, imposing license fees is considered with reference to the interstate commerce provisions of the Federal Constitution and the post-roads act of Congress, are grouped at this place in connection with taxation cases in which similar questions are involved.

Another series of municipal license cases, in which the power of municipalities to impose a fee in consideration for use of streets, may be found earlier in this volume. See note, page 121, *ante*.

See, also, INDEX to this and previous volumes, title "License Fee;" and notes, vol. 2, pages 116, 127, and vol. 3, pages 55, 71.

**WESTERN UNION TELEGRAPH COMPANY V. INMAN & I.
STEAMSHIP CO.****INMAN & I. STEAMSHIP CO. V. WESTERN UNION TELE-
GRAPH COMPANY.**

U. S. Circuit Court of Appeals, Second Circuit, Jan. 18, 1894.

(59 Fed. R. 365.)

POST-ROADS ACT.—WIRES OBSTRUCTING NAVIGABLE STREAM.

When a vessel is able to proceed by the use of her own power, even through mud at the bottom of a stream, she is "navigating" within the meaning of the word "navigation" as used in the post-roads act of Congress.

That being so, the burden is upon those maintaining cables in a place thus navigable of showing that an accident to the cables by a vessel fouling with them was not due to themselves.

Under the circumstances of the given case, held that such burden was not sustained.

APPEAL from Circuit Court for southern district of New York. In admiralty. Cross libels for damages to the submarine cables of the telegraph company by the screw of the steamship City of Richmond, and for injury to the screw by the same accident. In the court below the first named libel was dismissed and the other sustained. Said decision is reported 3 Am. Elec. Cas. 556.

Statement by LACOMBE, Circuit Judge :

These are appeals by the Western Union Telegraph Company from *pro forma* decrees of the Circuit Court, affirming decrees of the District Court, southern district of New York. Cross libels were brought by the parties, each claiming its damages sustained on August 16, 1887, by a fouling of the screw of the S. S. City of Richmond with submarine cables owned by the telegraph company, and extending under the North river from at or near Cortland

street, on the New York side, to and under the Netherland Steamship Company's pier, on the Jersey City side. The Netherland pier was there, and in use by ocean steamers, before the cables in question were laid under it; and ocean steamers have been in the habit of docking at Jersey City for forty years. The cables of the libellant were first laid there in 1867, under authority of the act of Congress of July 24, 1866. The district judge found the telegraph company solely in fault, dismissed its libel, and sustained the cross libel of the steamship company.

David D. Duncan, for appellant.

Henry G. Ward, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts): Briefly stated, the movements of the steamship on the day in question were as follows: She arrived in the vicinity of the Inman pier at about 9 A. M. on a flood tide. That pier is immediately below the Netherland pier, and immediately above the Red Star pier. Her own berth, on the north side of the Inman pier, was occupied by another steamer of that line, and the slip south of that pier was full of barges. The flood tide made it necessary for her to proceed some distance above, and then round to, so as to make the end of her pier (the only place available for landing passengers), against the tide—a manoeuvre equally necessary when she makes the slip on a flood tide. She lay, while discharging her cabin passengers and baggage over a forward gang plank, at the southern end of her pier, with her stern angling out in the river, and projecting up stream. By the time these were landed, the tide had fallen so much that she was in part touching the bottom, and, had she remained there till fully aground, the unevenness of the bottom would have caused damage by straining. She could not move forward without running into the Red Star pier, nor could she proceed directly astern, as she lay, without risk of hitting a

broad barge which lay at the end of the Netherland pier. With the aid of two powerful tugs hauling with hawsers on her port quarter, her stern was breasted out till the hawsers broke; the stern then resting in the mud at the bottom of the river some little distance southeast of the Netherland pier. Her propeller was then put in motion; the tugs still hauling at right angles to her course, so as to keep her stern down to southward until she struck the ebb tide. Steadily, and without any apparent obstruction or stoppage of her motion, the steamer, under her reversed screw, moved onward through the mud, passing on her way through a mud bank about 300 feet off the Netherland pier, until she reached the middle of the river, where she anchored. None of her officers, who were at their respective posts, and attentive to their duties, were conscious of her touching, striking, or fouling anything. The second officer, who was stationed at the stern, noticed a water-logged pile in motion near the stern-post, which he surmised had been started up from the bottom by the action of the propeller. Reporting this circumstance the next day to the first officer, a diver was sent down and found fragments of seven or eight submarine cables entangled in the screw.

The act of Congress above referred to gives libellant the right to lay its cables "under the navigable streams of waters in the United States," with the limitation or condition that such lines "shall be so constructed and maintained as not to obstruct the navigation of such streams and waters."

The district judge has elaborately set forth the facts in evidence, and, in affirming his decision, we do not deem it necessary to restate them all. The appellant has criticized some of his statements as to the character of the bottom at the locality in question, on the ground that they are not in all respects sustained by proof; but it is abundantly established by uncontradicted evidence that the cables intersected the line of a bank of mud which lay off the Netherland pier, and that the mud composing that bank was of such a character that the City of Richmond, under a

reversed screw, navigated herself through it stern first by her own power. That a vessel is navigating when she is able to thus proceed by the use of her own power is a self-evident proposition, which needs no citation to support it, though reference may be made to Gould, Waters, § 87; *Mayor, etc., of Colchester v. Brooke*, 7 Q. B. 339; *Ferguson v. Steamship Co.*, 10 Vict. Law R. 279.

It being clear that the steamer was navigating, it is for the owner of the cables to show that they were not so maintained as to obstruct navigation. Here, in the nature of things, the evidence is unsatisfactory. No one knows the condition of affairs at the bottom of the river on the morning in question. Whether, by reason of some kink, a part of one of the cables was protruded upward into the water, or whether one of them rested on the water-logged pile in such manner that when the latter was disturbed by the screw, it momentarily raised the cable above its ordinary location, or at what depth in the soft navigable mud the cables rested that morning, is all a matter of conjecture. Aside from occasional fouling of the cables by anchors, there is no evidence to show that they had theretofore interfered in any way with the movement of vessels, except that, a short time before, the propeller of the steamer *Westernland* had come in contact with them. When it is considered that the locality in question had been occupied for years by ocean steamers as large as the *City of Richmond*, which necessarily must, upon occasions, have plowed their way through this mud bank, the fact that the cables were never thus caught before is suggestive that there had been some recent change in their position. But, whatever the cause of the accident in question, the owner of the cables laid across this navigable stream has failed to show that it did not happen because of any failure to maintain them in such a way as not to obstruct navigation; and, as the owners of the steamship have shown that she was navigating when she encountered them, the person who undertook to maintain the cables so as not to obstruct navigation has failed

to sustain the burden of proof which the accident cast upon him.

Counsel for the appellant has argued at great length, and with abundant citation of authority, upon the question, what is the proper construction to be given to the words of limitation in the act, "not to obstruct the navigation?" The conclusion for which he contends is thus stated in his brief:

"The test must be, does it unreasonably, unnecessarily obstruct, in view of the objects to be accomplished? Does it obstruct or interfere with the navigation more than is necessary? Some interference, under some possible conditions and circumstances, is necessary; but is it reduced to the minimum in a given case?"

In answer to this two suggestions will suffice. Each case should be disposed of upon its own facts; and it may be taken as a safe rule that the degree of obstruction will vary with the character and extent of the navigation. In the case now before the court, the locality for the crossing was selected, for all that appears, voluntarily by the libellant. There is nothing to show that it was constrained by any necessity to lay its cables where it did, and not elsewhere. The obligation to maintain the cable so as not to obstruct navigation is fully operative when the question of a place to lay it is being decided. This locality had been occupied for years before by ocean steamers. The Jersey end of the cable was carried ashore under a dock built for and used by such steamers. The telegraph company knew, or could easily have ascertained, that, in certain conditions of the tide, there was not water enough off that pier for vessels such as these to navigate without plowing through the surrounding mud and silt, and is chargeable with knowledge that while such vessels, proceeding on their course up or down a river, will ordinarily keep well off from the shoaler water, it is to be expected that, where their own piers are located, they will navigate up, down, across, and in every conceivable course, however tortuous, while making their way through natural difficul-

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ties and obstructions to their landing places. Counsel refers to the City of Richmond as "operating in some peculiar mode, or under some special, extraordinary conditions;" but just such mode, and just such conditions of operation were to be expected at the place selected for the cable. It is not unreasonable, therefore, to hold the owner of the cable to a greater measure of precaution in maintaining it when laid there than when laid in some other place where such peculiar conditions of navigation do not exist.

It is urged that the City of Richmond is nevertheless liable because the general agents of the Inman line and the dock superintendent had knowledge that there were Western Union cables running from under the Netherland pier. Neither the pilot, however, nor the ship's navigating officers, knew of the presence of the cables; and there is no evidence of that malicious disregard of another's right of property which was held controlling in *Mayor, etc., of Colchester v. Brooke*, 7 Q. B. 339, and *Cobb v. Bennett*, 75 Pa. St. 328. In the absence of any notice by sign put up at the cable crossing, which the evidence shows is usual, we do not feel warranted in holding the City of Richmond responsible for navigating over the cable; and even if her officers knew it was there, they might fairly assume it was so maintained as not to obstruct her navigation.

The decrees of the District Court are affirmed, with interest and costs.

NOTE.—See *Blanchard v. W. U. Tel. Co.*, vol. 1, p. 176; *City of Richmond*, vol. 8, p. 558.

S. M. LINN ET AL. V. CHAMBERSBURGH BOROUGH.*Pa. Supreme Court, March 26, 1894.*

(100 Pa. 511.)

POWER OF MUNICIPALITY TO SUPPLY ELECTRIC LIGHT.

The Legislature has the power to authorize municipal corporations to manufacture and supply electricity for lighting, both public and private.

FACTS stated in opinion.

O. C. Bowers, for appellants.

J. D. Ludwig, for appellee.

PER CURIAM: This bill was brought to restrain the borough of Chambersburgh from manufacturing and supplying electricity for the use and benefit of its inhabitants, under the provisions of the act of May 20, 1891 (P. L. 90). It is grounded mainly on allegations which, in substance, are (1) that said act is unconstitutional, and (2) that the debt which would necessarily be incurred by the borough in carrying into effect its proposed undertaking, will increase its indebtedness to an amount in excess of the constitutional limit of 7 per centum of the assessed valuation of taxable property within the corporate limits. As to both of these allegations the learned master's findings of fact and legal conclusions are in defendant's favor. The first five specifications charge error in overruling the several exceptions to the master's conclusions of law recited therein, respectively. For reasons sufficiently stated in the report and in the opinion of the learned president of the Common Pleas, approving the same, we think there was no error in refusing to sustain either of said exceptions. The burden was on the plaintiffs to prove that the indebtedness

of the borough would be necessarily increased to an amount exceeding the constitutional limit, etc. In that they were unsuccessful. While the legislative intention may not be as clearly and happily expressed as it might have been, we fail to discover anything in the provisions of the act that is in conflict with the Constitution. The power of the Legislature to authorize municipal corporations to supply gas and water for municipal purposes, and for the use and benefit of such of their inhabitants as wish to use and are willing to pay therefor at reasonable rates, has never been seriously questioned. In view of the fact that electricity is so rapidly coming into general use for illuminating streets, public and private buildings, dwellings, etc., why should there be any doubt as to the power to authorize such corporations to manufacture and supply it in like manner as artificial gas has been manufactured and supplied? It is a mistake to assume that municipal corporations should not keep abreast with the progress and improvements of the age.

NOTE.—In *Spaulding v. Peabody*, Massachusetts Supreme Court, Jan. 12, 1891 (153 Mass. 129), held that cities and towns had no authority under existing statutes to erect and maintain works for electric lighting of the streets or to supply light to the inhabitants.

In the same year, a statute was passed conferring such authority. Laws 1891, ch. 870; amended, L. 1892, ch. 259, and L. 1893, ch. 454.

In *Crawfordsville v. Braden*, Indiana Supreme Court, Oct. 27, 1891 (130 Ind. 149), it was decided that a city has the right to establish works for lighting its streets, and in connection therewith to furnish private consumers such light by contract.

In an earlier case, *Rushville Gas Co. v. Rushville*, 121 Ind. 212, the power of a city to buy and operate an electric lighting plant and to issue bonds to pay therefor was affirmed.

In *Rockebrandt v. City of Madison*, Indiana Appellate Court, Feb. 14, 1894 (36 N. E. Rep. 844), held that a common council, empowered by statute (Rev. St. 1894, sec. 4301), to light its streets, alleys, and other public places with electric lights, and to contract with other corporations or individuals for such lighting, or to operate its own plants, may employ a lineman for its electric light system for a term of three years, at a monthly salary, and is liable to him for breach of such a contract.

See also *Thomson-Houston Electric Light Co. v. City of Newton*, vol. 2, Am. El. Cas. 507, and note thereto.

**THE ELECTRIC POWER COMPANY, Respondent, v. THE
METROPOLITAN TELEPHONE & TELEGRAPH COMPANY,
Appellant.**

New York Supreme Court, General Term, First Department, Jan., 1894.

(75 Hun, 68.)

**REMOVAL AND CONVERSION OF ELECTRIC WIRES.—LIABILITY OF MASTER
FOR TORT OF SERVANT.**

The plaintiff, a duly incorporated company engaged in the business of supplying electric power to customers, maintained its lines of wire attached to fixtures, so-called, fastened to house tops, some of which fixtures belonged to it, and some to the defendant, a telephone company.

The defendant, without notice to the plaintiff, cut and removed the wires of the latter from all the fixtures of both companies; and the servants of the defendant also carried away and converted the wire.

In an action brought to recover damages, first, for the trespass and cutting of the wires, second, for injury to plaintiff's business, and third, for the conversion of the wire, the jury, under instruction of the trial court, rendered a verdict for the plaintiff for a sum less than the value of the converted wire and the injury caused by cutting wires from plaintiff's own fixtures, with interest thereon.

Upon appeal by the defendant from the judgment entered upon said verdict, it was upheld, upon the broad grounds, that the injury to the plaintiff's line was a trespass, and the carrying away of the wires conversion; for which the judgment did not even compensate the plaintiff; and that under the circumstances, the acts of the servants of the defendant in removing and carrying away were so closely and intimately connected with their employment that the employer should be held liable.

Burton N. Harrison, for the appellant.

Roger Foster, for the respondent.

O'BRIEN, J.: In his charge to the jury the learned trial judge clearly stated the facts and defined the issues. As therein said: "On or before April, 1891, it appears from the proofs that the plaintiff corporation was engaged in the

maintenance of lines of electric wires, over which it furnished power to customers for the movement of machinery, for which the plaintiff charged and received certain rentals or compensation. The corporation was organized under a general act of the Legislature of the State of New York. * * * That, being in the enjoyment of this business, some time in March and the first part of April, 1891, the defendant corporation, whose business is indicated, perhaps, by its title, the Metropolitan Telegraph and Telephone Company, by its agents and servants, committed what, in legal parlance, may be called a trespass upon the property of the defendant, in that, by its agents and servants, during the last part of the month of March and the first part of the month of April, the defendant cut and carried away certain wires of the plaintiff, thereby appropriating its property in the wires and causing it damage for the recovery of which this action is brought."

It was alleged in the complaint, and made to appear on the trial, that the plaintiff had wires attached to fixtures belonging to itself, and also upon fixtures belonging to the defendant. With respect to the latter, there was a dispute as to whether permission had ever been granted to plaintiff to so attach its wires. The plaintiff, however, insisting that it had a lease or at least a license, sought to make the defendant responsible for the damage which it claimed was done to its business, in addition to compelling it to pay for the injury resulting from the cutting of the wires and the carrying away and converting of the same by defendant.

As the damages which it was held the plaintiff could recover were limited solely to such as it could show resulted from the conversion of the wire belonging to it, we may eliminate the other questions from our consideration, leaving it to be determined whether the judgment in this case is right which awarded to the plaintiff damages for the taking of such wire cut and removed from housetops, some from fixtures owned by defendant and some from plaintiff's own fixtures.

Apart from the questions of their having cut and removed

the wire and the damages resulting therefrom, the defendant claims that there were certain insurmountable obstacles in the way of any recovery in this case, growing out of the want of authority in the plaintiff to conduct the business which it was carrying on in this city, and for other reasons which will be noticed. It is insisted that, as the defendant had lawful authority to carry on its business, and as the plaintiff had no authority to carry on the business shown to have been done by it with the electrical conductors here in question, therefore the defendant was justified in cutting and removing such wires, without being liable to plaintiff in damages.

To this, we think, there are two answers.

The plaintiff was in possession of the fixtures with its wires, conducting a business from which it received a revenue, and though this were done without authority it would afford no excuse for the destruction of its property by the defendant. And, second, conceding that the defendant had the right to remove plaintiff's wires from the fixtures, by thereafter carrying those wires away it made itself liable.

We think that similar reasons apply to the argument based upon the failure of the board of electrical control to give permission to do the business in the way in which it was being conducted by plaintiff. And while it may be true that defendant would not be responsible for any injuries resulting to plaintiff from the former's attempt to comply with the requirements of the notice of the board of electrical control directing the removal of plaintiff's wires from defendant's fixtures, this would not entitle the defendant upon removing such wires to carry away and convert the same. These considerations might be pertinent if damages had been allowed for the fact of the cutting, or for the injury resulting therefrom to plaintiff's business. But where, as here, the recovery was limited to such damages as were shown to have resulted from the appropriation of plaintiff's property, we fail to see how these can be made available as a defense.

Other suggestions, which we regard as equally irrelevant, are made for the purpose of shielding the defendant from liability, but these we do not deem it necessary to discuss, feeling that the validity of this judgment must be determined by a consideration of the merits of the controversy as finally submitted to the jury.

There was proof tending to show that all the wire which the defendant cut and took away was of the value of \$2,296. Of this amount \$900 was claimed to have been wire cut from plaintiff's own fixtures, and to replace which required the expenditure of \$100 to linemen and workmen. If we add to this the interest upon the value of the property taken between the date of conversion and the trial, it will be found that these aggregate amounts exceed the sum awarded by the jury, and, therefore, there can be no claim of excessive damages. The real questions, however, are those which were clearly presented to the jury by the trial judge, as to whether any wire belonging to plaintiff was appropriated and carried away by the servants of the defendant corporation; and if so, how much, and what was its value. In addition, we have the more serious question, whether the defendant is liable for the acts of the persons who after cutting removed the wire.

Upon all these questions, except as to the defendant's responsibility for the acts of those who carried away the wire, the proof as presented furnishes the answer. Though from our examination we think it is reasonably free from doubt that the same persons who cut the wire were engaged in removing and did remove most, if not all of it, there is not the same certainty with respect to the amount of wire so removed, nor entirely satisfactory evidence as to the value thereof. From the very nature of the acts charged, however, it was difficult, after the wire was removed, to describe its condition and determine with accuracy the exact amount taken, or, in view of the extent of its use, its true value when cut and removed. But we do not think, if it can be found that the defendant is responsible, that it is necessary for the court to refuse to accept the only evidence

offered, or that could be offered, though unsatisfactory, and to accord it no weight simply because, by reason of the illegal acts of third persons, more satisfactory proof is impossible.

Upon the question of damages, or in regard to the evidence offered in support thereof, we see no valid reason for disturbing the verdict of the jury, to whom all the circumstances connected with the cutting and removal were presented, and who had all the light that could be furnished them in determining the amount.

The one question, however, which we do not regard as entirely clear is as to the liability of the defendant for the acts of its employes in removing the plaintiff's wire after it had been cut. As stated, we think the jury were justified in concluding that it was removed by the same persons who cut it and also that such persons were the employes of the defendant. Assuming, therefore, that the defendant had the right, either under the directions of the board of electrical control, or independently thereof, to remove the wires from its fixtures, for the reason that they were upon such fixtures without its authority and contrary to law, and were both a public nuisance and a special nuisance to defendant, is the defendant liable for the further acts of its servants in converting the plaintiff's property?

It is insisted that such torts were not within the scope of their employment by defendant, and that defendant cannot be held liable for them. Undoubtedly authorities can be found both in England and in this country to uphold this contention, but it is not our purpose to examine them at length, thinking as we do that there has been upon this branch of the law a gradual tendency to increase the liability of the master for the acts of the employe, and of a principal for acts of an agent, done not only within the scope of his employment, but also within the scope of the business with which he is intrusted. And this is well summarized in a note in 24 Abbott's New Cases, page 183, wherein it is said: "A few years ago it was almost univer-

sally held in this country that an act of the employe, the motive of which appeared to be his own malice, did not render the employer liable, even though done within the scope of the employment; but all the authorities which sanction that rule are now deemed, in so far, overruled, and in respect to the question of the right of action the motive of the servant is now immaterial, and even the fact that the employer gave proper instructions, and that the act was in direct violation of those instructions, does not shelter the employer. The only question is, where the line is to be drawn between acts so related to the employment that it is just to hold the employer liable, and acts so disconnected from it that the employe alone should be liable."

And, upon the question of principal and agent, the extent to which the courts will go in protecting third persons from such agent's acts is stated in the case of *Fifth Avenue Bank v. Forty-Second Street & Grand Street Ferry R. R. Co.*, 137 N. Y. 231.

We think, therefore, that where it has been shown that by the directions of the defendant the wire belonging to the plaintiff was cut from fixtures on the housetops and removed therefrom, without notice to plaintiff, and without affording it a reasonable opportunity of collecting together and reclaiming such property, and where, in addition, it was shown that such wire was removed by the employes and servants of the defendant, it was an act so closely and intimately connected with and related to their employment that it is but just that the employer in this instance should be held liable.

We have examined the exceptions to rulings upon the evidence and upon the requests to charge, but do not think that these require any special mention.

Upon the entire case we think the judgment is just and right, and that it should be affirmed, with costs and disbursements.

VAN BRUNT, P. J., and FOLLETT, J., concurred.

Judgment affirmed, with costs and disbursements.

Power Co. v. Telephone & Telegraph Co.

NOTE.— The respondent's brief upon the above appeal, which has been furnished me, contains so much that is interesting, both by itself and in connection with the opinion of the court, that a brief abstract of it is here presented, showing a portion of the cases cited.

It appears that the pretext of the defendant for cutting the wires in question was an order of the board of commissioners of electrical subways, directing the defendant to remove from its "pole-lines in this city all electric light and power wires."

The plaintiff demanded \$100,000 damages, for the cutting and conversion of the wire; and for loss of business alleged to have been sustained thereby. Under the instruction of the court, damages were limited to the single item of conversion of the wires and direct injury to the plaintiff by reason of the removal of the wires from its own fixtures.

The first point made by the respondent in support of its judgment is that even admitting plaintiff's use of its wires to have been unlawful, defendant had no right to convert its property. Upon this point are cited *Claussen & Sons Brewing Co. v. B. & O. R. R. Co.*, 2 Am. Elec. Cas. 210; *Lawrence v. Met. El. Ry. Co.*, 126 N. Y. 483.

The next two points are that even though the wires were a nuisance which defendant had a right to abate, still it had no right to convert them (citing *Mark v. Hudson River Bridge Co.*, 103 N. Y. 28; *Burnham v. Jenness*, 54 Vt. 272; *Roberts v. Rose*, 1 L. R. Ex. 83, and other authorities), or to remove them without giving plaintiff notice of such proposed action (citing *Jones v. Williams*, 11 M. & W. 176).

The fourth point is based upon the fact of a tenancy by the plaintiff of defendant's fixtures for the purpose of supporting its wires, and is that such tenancy could be terminated only by judicial proceedings. An interesting argument is made going to show that the plaintiff had an easement or interest in real estate. Among the cases cited in support of this position are *Badger Lumber Co. v. Marion Water Supply, Elec. Light & Power Co.*, 4 Am. Elec. Cas. 551; *Mutual Un. Tel. Co. v. Chicago*, 2 Am. Elec. Cas. 506; *St. Louis v. W. U. Tel. Co.*, 4 Am. Elec. Cas. 102; *State, Hudson Teleph. Co. Pros. v. Jersey City*, 2 Am. Elec. Cas. 133; *New Orleans v. Great So. Teleph. & Tel. Co.*, 2 Am. Elec. Cas. 122; *Hannibal v. Mo. & Kan. Teleph. Co.*, 2 Am. Elec. Cas. 146; *Electric Construction Co. v. Heffernan*, 3 Am. Elec. Cas. 207; *Tissot v. Great So. Teleph. & Tel. Co.*, 2 Am. Elec. Cas. 286.

The fifth and sixth points are that the board of subway commissioners had by statute no control over wires affixed to house tops (citing *Wandsworth Dist. Board v. U. K. Teleph. Co.*, 2 Am. Elec. Cas. 175, note); and by its order attempted to exercise no such control; it mentioned "pole-lines" only.

The seventh point is that the plaintiff's system of wires on housetops was not a nuisance (citing *U. S. Illum. Co. v. Grant*, 3 Am. Elec. Cas. 95).

Points eight and nine, that the plaintiff's charter permitted it to conduct its business as it was conducted (citing *People, ex rel. Mun. Gas Co. v. Rice*, a memorandum of which will be found in the "General Note" at the

Telegraph Co. v. Cunningham.

end of this volume); and even if it did not, that afforded no excuse for the destruction of its property by the defendant.

Points ten and eleven are that the franchise granted to the plaintiff by the board of electrical control gave it the right to maintain its wires overhead, until the appropriate subways were constructed (citing *People v. Squire*, 8 Am. Elec. Cas. 176); or if not, still, only such specific wires could be removed as were dangerous to life (citing *U. S. Illum. Co. v. Grant*, *supra*).

The twelfth point is that even conceding the authority of defendant to remove the wires, by carrying them away it exceeded such authority and became a trespasser *ab initio*.

Point thirteen, in accordance with which the judgment was sustained, is that the defendant was liable for the acts of its servants in stealing the wire in the course of their employment, even though the theft was a violation of its instructions. Upon this point are cited, in addition to the authorities referred to in the General Term opinion, the following: *Higgins v. Waterliet Turnpike, &c. Co.*, 46 N. Y. 23; *Cosgrove v. Ogden*, 49 N. Y. 255; *Ochsenbein v. Shepley*, 85 N. Y. 214; *Stewart v. Brooklyn, &c. R. R. Co.*, 97 N. Y. 588; *Carpenter v. Boston, &c. R. R. Co.*, 97 N. Y. 494.

WESTERN UNION TELEGRAPH CO. v. CUNNINGHAM.

Alabama Supreme Court, June 7, 1893.

(99 Ala. 814.)

DELAY OF TELEGRAM.—RIGHT OF ADDRESSEE.—MENTAL DISTRESS.

The addressee of a telegram delivered for transmission in reply to a message of inquiry as to the health of his mother, by the delay of which reply-message he was prevented from reaching his mother before her death, has a cause of action against the company, and in such action the question of punitive damages is for the jury, who may award damages for mental suffering.

The company cannot excuse itself upon the ground that prepayment was not made for sending the telegram, which its agent accepted for transmission, it not appearing that the sender knew of the rule of the company requiring prepayment.

Case of this series cited in opinion: *W. U. Tel. Co. v. Wilson*, vol. 3, p. 583.

APPEAL by defendant below from judgment of Gadsden City Court. Facts stated in opinion.

Denson & Tanner, for appellant.

J. A. Bilbro, contra.

HEAD, J: The complaint alleges that plaintiff, whose mother was at the time very ill at or near Bluff City, Tennessee, sent by the defendant telegraph company, on the evening of April 5, 1890, from Attala, Alabama, to his sister-in-law at Bluff City, a telegraphic message as follows:

How is ma? Answer at once.

That this message was promptly transmitted and delivered to plaintiff's brother, at Bluff City, about an hour afterwards, who at once replied as follows:

No better this morning, but little hopes of recovery.

That this reply was given to defendant, to be forwarded immediately, which defendant promised to do, but negligently and carelessly failed to do until the next day after it was received; that plaintiff, on receiving the reply, at once went to his mother, and on reaching her bedside, found that she had been dead several hours. The complaint alleges that, if defendant had promptly transmitted and delivered his brother's message, he would have reached his mother several hours before her death; that by reason of the failure, etc., plaintiff suffered painful anxiety and distress of mind, etc.

The defendant interposed demurrers to this complaint, but, if the complaint contains a substantial cause of action, we cannot consider them, for the reason that they are general demurrers, forbidden by the statute. Code, § 2690.

The principle is settled by our decisions, that the sendee of a message, between whom and the company there is no contractual relation in reference to its transmission, cannot maintain action for damages for mental anguish suffered by him by reason of a negligent failure to transmit the message. *West. Un. Tel. Co. v. Wilson*, 93 Ala. 23, and cases there cited. We are of opinion the present complaint discloses that relation between the plaintiff and the defendant. The message which the plaintiff sent to his

sister-in-law, in legal effect, if she had acted under it, constituted her his agent to obtain for him the necessary information as to the condition of his mother, and communicate the same to him, at his expense. The defendant transmitted and delivered this message, and knew its import; knew the service was to be performed by her, for the use and benefit of the plaintiff, and at his special request. The brother received the message, and undertook to perform, and did perform, the service, in the place of the sister-in-law; and it is alleged the defendant received from him the reply, and agreed to send it. It was competent for the plaintiff to ratify, and he did ratify, this substitution of the brother for the sister-in-law in the performance of the service; and the defendant, knowing all the facts, and having received the reply from the brother, and agreed to send it, cannot be heard to complain that the agency was not performed by the sister-in-law. We think, therefore, the complaint shows a substantial cause of action for the recovery of damages for the breach of a contract made with the plaintiff to transmit and deliver the reply message; and in aggravation of the damage naturally resulting from that breach, which in this case is merely nominal, special damages for mental anguish, if any resulted, may be recovered.

The evidence shows that the delivery of the reply message to the agent of the defendant, if that delivery occurred according to the plaintiff's version, was not accompanied by payment of the toll, or reward; the plaintiff's testimony tending to show that the agent agreed to accept payment next morning, when it would be more convenient to make the necessary change. The agent, King, testified: "The rules of the company did not allow me to credit anybody. I had no instructions to credit anybody. Cash must be paid before message is sent." The evidence shows that he was the operator in charge of the defendant's office at Bluff city. It was his duty to transact generally the telegraph business of the defendant at that place. He was therefore a general agent for that purpose. There is no evidence

tending to show that plaintiff or his agent, the brother, knew of any limitation imposed by the company upon the authority of its agent to contract for the sending of a message without prepayment of the toll. *Louisville Coffin Co. v. Stokes*, 78 Ala. 372; 1 Am. & Eng. Encyc. Law, 350; *Wheeler v. McGuire*, 86 Ala. 398. If, therefore, it be true, as the plaintiff's evidence tends to show, that the agent waived the payment until the next day, and accepted the message, and agreed to send it at once, the defendant can not avail itself of private instructions, not known to the plaintiff, forbidding the agent so to act. Authorities *supra*.

Inasmuch as the plaintiff's evidence tends to establish the material allegations of the complaint, the general charge requested by the defendant was properly refused.

Charge number one requested by the defendant raises the question whether, as a matter of law, upon the effect of the whole evidence, the plaintiff might recover punitive damages. We are of opinion that was a question for the jury. The telegram disclosed that plaintiff's mother was very ill, with but little hope of her recovery. It was in reply to plaintiff's message requesting the information at once. Plaintiff's brother testified that he said to the operator that he wanted the message to go at once, and he promised that it should. These facts suggested urgent necessity for the utmost promptness and dispatch on the part of the defendant. If, under these circumstances, as the plaintiff's evidence tends to show, the message was received by the defendant for transmission, and was detained from one day until the next, we think it was properly left to the jury to determine whether such failure was or not so grossly negligent as to evince an utter disregard of the feelings and rights of the plaintiff. If such was its character, the jury might properly have awarded punitive damages. The charge was properly refused.

We are asked to review the ruling of the City Court refusing a motion for a new trial. The grounds of the motion insisted upon in argument are, 1st, that the verdict

was contrary to the evidence; 2nd, that the damages awarded were excessive.

It is very clear, under the evidence, that we can not disturb the ruling of the court on the first ground of the motion. The testimony of plaintiff's brother is positive and emphatic that the message was delivered by him, on the night of the 5th of April, to King, the operator, in person, who promised to send it at once. On the contrary, the testimony of King is positive and emphatic that the message was not handed to him in person, but was sent to him by the hands of Davis, a young man in the office; that he refused to receive and transmit it, because not accompanied by payment of the toll, until the next morning, when plaintiff's brother called at the office and paid the toll. King's version of the transaction is corroborated by Davis. These witnesses were before the jury, who had the opportunity of observing their demeanor, and determining more intelligently than we can who was most entitled to credit. Moreover, the proof is undisputed that the house of plaintiff's brother, where the message was written, and where he could at once be found, was only 150 yards from the telegraph office. Taking the defendant's evidence as presenting the true version, Davis was the man appointed by King to deliver the plaintiff's message of inquiry. Davis delivered it, and received from plaintiff's brother the reply, with the request that it be transmitted at once, and the statement that he, the sender, would call next morning and pay for it. Davis carried it to the office, and offered it to King, making known the sender's request. In view of the urgent nature of the message, and the very short distance the sender then was from the office, it was clearly King's duty to have notified the sender of his unwillingness to send the message without prepayment of the toll, so as to have given the latter an opportunity to comply with the demand. This duty he ignored, and left the sender to remain in reliance upon the belief that the message had been promptly transmitted. This was, in our judgment, of itself, a waiver of the right to demand prepayment, and it was King's duty to have sent the message.

The plaintiff's actual damages in this case were alone sustained in the mental anguish he suffered by reason of not reaching his mother's bedside before her death. The law fixes no standard by which to measure such damages, except the application to the peculiar circumstances of the case, of the sound judgment and discretion of the jury, and their just and impartial determination of what sum is fair and right to be awarded. The jury in the present case awarded five hundred dollars. In this sum they may have lawfully, as we have said, included damages by way of punishment. The amount is not so great that we can say it is manifestly unjust or oppressive, and we must, therefore, treat the verdict as not an improper exercise of the discretion of the jury. The judgment of the City Court is affirmed.

NOTE.—See INDEX, titles "Mental Distress," "Receiver or Addressee."

For earlier Alabama telegraph cases, see *W. U. Tel. Co. v. Henderson*, 3 Am. El. Cas. 570, and note thereto.

J. B. BROOKS v. WESTERN UNION TELEGRAPH COMPANY.*Arkansas Supreme Court, May 21, 1888.*

(56 Ark. 294.)

ARKANSAS TELEGRAPH STATUTE.—CONSTRUCTION.

The act of March 1, 1885, which imposes a penalty upon a telegraph company for refusal to "transmit over its wires to localities on its line" any message tendered to the company for transmission, does not impose such penalty for refusal to deliver the telegram from the terminal office to the addressee.

Cases of this series cited in opinion: *Little Rock & Ft. Smith Tel. Co. v. Davis*, vol. 1, p. 526; *Frauenthal v. W. U. Tel. Co.*, vol. 2, p. 479.

APPEAL by plaintiff below from judgment of Circuit Court, Garland county. Facts stated in opinion.

Charles D. Greaves, for appellant.

U. M. & G. B. Rose, for appellee.

COOKRILL, C. J.: The act of March 31, 1885, imposes a penalty upon a telegraph company for refusing to "transmit over its wires to localities on its line" any message tendered to the company for transmission. The controlling question in this case is, does this language impose a penalty for the company's refusal to deliver a message to the addressee after it has been transmitted over its wires to the locality on its line to which it is addressed?

The terms of the act are confined to a refusal to "transmit over the wires." The language is not to transmit and deliver the message, as in the Indiana act referred to in argument; nor is it simply "to transmit," as in our act of 1881, which was construed to mean to transmit to the addressee, in the *Little Rock, &c. Telegraph Co. v.*

Davis, 41 Ark. 79. The terms of the present act confine the penalty to the refusal to transmit over the wires to the locality on the line to which the message is addressed.

The statute is penal, and its terms cannot be extended beyond their obvious meaning. Where there is a doubt such an act ought not to be construed to inflict a penalty which the Legislature may not have intended. This is a familiar rule of construction. Applied to this case, it resolves the question in favor of the company, for it cannot be said that the language plainly implies the intention to visit a penalty for a refusal to deliver a message after it has been transmitted. It follows that it is only when a telegraph company doing business in this State refuses to transmit a message tendered to it that the penalty is incurred. *Frauenthal v. Western Union Telegraph Co.*, 50 Ark. 78.

When the message is transmitted, and the company neglects or refuses to deliver it when its obligation requires delivery, the person injured is remitted to his common-law remedy. The appellant does not contend that he has alleged facts entitling him to recover on the latter score. We find no error, and the judgment will be affirmed.

NOTE.—In *W. U. Tel. Co. v. Fellner*, Supreme Court, June 17, 1898 (58 Ark. 29), held that in an action for failure to deliver a message instructing the addressee to purchase stock for the sender, the mere fact that the stock advanced shortly after the message was sent and remained so until after the trial does not entitle the sender to special damages against the telegraph company, in absence of proof that if the stock had been purchased it would have been sold at a profit.

For earlier Arkansas telegraph cases, see vol. 3, p. 604, and preceding cases.

The following telegraph negligence cases were decided in CALIFORNIA during the period covered by this volume:

Robert Acheson v. W. U. Tel. Co., Supreme Court, Dec. 8, 1893 (96 Cal. 641).

In an action for damages due to error in transmission of a telegram, in absence of an allegation in the complaint of facts going to show special damages, only nominal damages can be recovered.

Kenyon v. W. U. Tel. Co., Supreme Court, Dec. 21, 1893 (100 Cal. 494).

In an action for damages for failure to deliver a message and consequent

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failure of plaintiff to receive an appointment to an office, the tenure of which was only at the pleasure of the appointing officer, damages for loss of salary are speculative and cannot be made a basis for recovery.

COLORADO.—In *W. U. Tel. Co. v. Cornwell*, Court of Appeals, Oct. 24, 1883 (2 Col. App. 491), held, that under the rule in *Hadley v. Baxendale*, a telegraph company which held a telegram three and a half hours in the receiving and terminal offices was held liable to the addressee only in the cost of sending the message and incidental expenses, the importance of prompt delivery and loss probable from delay not being apparent from the message or known to the operator.

**WESTERN UNION TELEGRAPH COMPANY, Appellant, v.
CHARLES M. WILSON, Appellee.**

Florida Supreme Court, Nov. 3, 1893.

(33 Fla. 527.)

FAILURE TO DELIVER CIPHER TELEGRAM.—DAMAGES.

The rule of *Hadley v. Baxendale* applies to contracts for the transmission of telegrams. Therefore for failure to transmit and deliver a cipher or unintelligible dispatch, only nominal damages, or the sum paid for transmission, can be recovered.

W. U. Tel. Co. v. Hyer, 2 Am. Elec. Cas. 484, overruled.

Cases of this series cited in opinion: *W. U. Tel. Co. v. Hall*, vol. 2, p. 303; *First National Bank v. Telegraph Co.*, vol. 1, p. 231; *Candee v. W. U. Tel. Co.*, vol. 1, p. 99; *Daniel v. W. U. Tel. Co.*, vol. 1, p. 650; *Beaupre v. Pacific & Atlantic Tel. Co.*, vol. 1, p. 141; *Tyler, Ullman & Co. v. W. U. Tel. Co.*, vol. 1, p. 14; *Manville v. W. U. Tel. Co.*, vol. 1, p. 93; *W. U. Tel. Co. v. Edsall*, vol. 1, p. 715; *Hibbard v. W. U. Tel. Co.*, vol. 1, p. 62; *Thompson v. W. U. Tel. Co.*, vol. 1, p. 773; *W. U. Tel. Co. v. Hyer Bros.*, vol. 2, p. 484; *Daughtery v. Am. Un. Tel. Co.*, vol. 1, p. 588; *W. U. Tel. Co. v. Way*, vol. 2, p. 455; *W. U. Tel. Co. v. Fatman*, vol. 1, p. 666; *W. U. Tel. Co. v. Reynolds*, vol. 1, p. 467; *Cannon v. W. U. Tel. Co.*, vol. 2, p. 699.

APPEAL from judgment rendered in Circuit Court, Escambia county, in favor of plaintiff. Facts stated in opinion.

Mallory & Maxwell, for appellant.

John C. Avery, for appellee.

TAYLOR, J.: The appellee sued the appellant in the Circuit Court of Escambia county, in case, for damages for its failure to transmit and deliver a telegraphic message in cipher. The suit resulted in a judgment for the plaintiff in the sum of \$688.88, and therefrom the defendant telegraph company appeals.

The declaration alleges as follows: "That the Western Union Telegraph Company, a corporation, the defendant, on the 12th day of December, 1887, was engaged in the business of transmitting telegraphic messages between Pensacola, Florida, and New York, in the State of New York, and in the delivery thereof to other cable and telegraph companies for transmission to Liverpool, England, where the said plaintiff had a regular merchant broker or agent, to wit, one A. Dobell, through whom the plaintiff negotiated, by means of such messages, the sale in Europe of cargoes of lumber and timber, the plaintiff being then and there a timber and lumber merchant at the city of Pensacola. That on said day the plaintiff delivered to the defendant, and the defendant received from him at its office in the city of Pensacola, and undertook to transmit and cause to be transmitted, and it was its duty to transmit and cause to be transmitted, to the said A. Dobell, the following cipher message:

Dobell, Liverpool:

Gladfulness — shipment — rosa — bonheur — luciform — banewort — margin.

Which the said Dobell would have understood, and the plaintiff intended to be an offer of a cargo of lumber and timber from said port of Pensacola for sale through the said Dobell in Europe, and the said Dobell would have sold the same for the plaintiff on the terms of said offer at a profit to the plaintiff of twelve hundred dollars, but the

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defendant failed and neglected to send said message, in violation of its duty to the plaintiff, and to the plaintiff's loss of \$1,200," and therefore he sues, etc.

At the trial, the plaintiff, over the defendant's objection, was permitted to testify, in establishment of the damages claimed, that he had to sell his cargo of lumber in Europe upon the market for the best price he could get, which was fifty two shillings a load, and which amounted to \$630.84 less than the price at which *he offered same for sale in the message failed to be sent*. The overruled objection of the defendant to this testimony was, that the damage sought to be shown thereby was too remote, and was not in the contemplation of the parties at the time of the alleged making of the contract for the transmission of said message. To this ruling the defendant excepted, and it is assigned as error. The question presented is, what is the proper measure of damages to be recovered of a telegraph company holding itself out to the service of the public for hire as the transmitter of messages by electricity, upon its failure to transmit or deliver a message written in cipher, or in language unintelligible except to those having a key to its hidden meaning. As this question has heretofore been passed upon by this court contrary to the views we find it impossible to become divested of, and as we think, contrary to the great weight of the well reasoned adjudications, both in this country and in England, we take it up with diffidence that finds no palliative in the fact that the decision heretofore was by a divided court. *W. U. Tel. Co. v. Hyer Bros.*, 22 Fla. 637 (1 South. Rep. 129). In that case the majority of the court, while approving the following well-established rule first formulated in reference to carriers of goods in the *cause celebre* of *Hadley v. Baxendale*, 9 Exch. 341: "Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and substantially be considered as arising naturally, *i. e.*, according to the usual course of things, from such breach of contract it

self, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it," hold that it has no applicability to the contracts of telegraph companies for the transmission of messages, and that such companies may be justly considered and treated as standing alone, a system unto itself. The reasoning leading to this conclusion is as follows: "The common carrier charges different rates of freight for different articles, according to their bulk and value, and their respective risks of transportation, and provides different methods for the transportation of each. It is not shown here that the defendant company had any scale of prices which were higher or lower, as the importance of the dispatch was great or small. It cannot be said, then, that for this reason the operator should be informed of its importance, when it made no difference in the charge of transmission. It is not shown that if its importance had been disclosed to the operator he was required by the rules of the company to send the message out of the order in which it came to the office. with reference to other messages awaiting transmission, that he was to use any extra degree of skill, any different method or agency for sending it, from the time, the skill used, the agencies employed or the compensation demanded for sending an unimportant dispatch, or that it would aid the operator in its transmission. For what reason, then, could he demand information that was in no way whatever to affect his manner of action, or impose on him any additional obligation? It could only operate on him persuasively to perform a duty for which he had been paid the price he demanded, which in consideration thereof he had agreed to perform, and which the law in consideration of his promise and the reception of the consideration therefor had already enjoined on him." The answer to all this is that the same argument is equally applicable as a reason why the rule in *Hadley v. Baxendale* should not apply to carriers of goods for hire. The carrier of goods, in contracting to carry and deliver, deals

with the tangible ; when he contracts he has in his mind's eye, *from the visible, tangible subject of his contract*, what will be the probable damage resulting directly from a breach of it on his part, and so has the other party to the contract with the carrier ; therefore the damage likely to flow from a breach by the carrier can properly be said to enter *mutually* into the contemplation of *both parties* to the contract, and it is this *mutuality in the contemplation of both parties to the contract of the results* that will be likely to flow directly from its breach that really furnishes that equitable feature of the rule that the damages thus *mutually contemplated* are in fact the damages that the law will impose for the breach. Why? Because in the eye of the law, the parties having *mutually contemplated* such damages in going into such contracts, those damages can alone be inferred as having *entered into their contract as a silent element thereof*. The rule in *Hadley v. Baxendale* is applicable alone to breaches of *contract*, and formulates concisely the measure of damages for the breach of those *contracts* that do not within themselves, in express terms, fix the penalty to follow their breach. In other words, this rule does nothing more than to give expression to that *part of the contract* which, in the eye of the law, has been *mutually agreed upon between the parties*, but concerning which their contract itself is silent. This essential and leading feature of the rule, we think, was wholly lost sight of in the discussion of the question in *Hyer Bros. v. W. U. Tel. Co.*, *supra*, *i. e.*, that the damages provided for under the rule arise *ex contractu*, and that, unless there is *mutuality* in all the essential elements that enter into or grow out of the contract, the whole fabric becomes *unilateral*, and abhorrent in the eyes of the law. The assertion, as a rule of law, that one party to a contract shall *alone have knowledge* that a breach of that contract will directly result in the loss of thousands of dollars, and that upon such breach he can recover of the other *party to the contract* all of such, to him, *unforeseen, unexpected, un contemplated, non-consented-to* damages seems to us to be a complete upheaval

of all the old landmarks in reference to damages upon broken contracts, and the establishment of a *new rule*, that is neither fair, just nor equitable; and which, if it is to be applied to the broken contracts of telegraph companies, must also, according to every principle of consistency, be applied, under like conditions, to every violated contract where individuals are the contracting parties. The argument in *Hyer Bros. v. W. U. Tel. Co.*, *supra*, that it was not shown that the telegraph company would have charged more, or used more dispatch or taken more care, or been aided in any way in the performance of its duty, if it had been informed of the contents or purport of the message contracted to be sent in that case, is entirely foreign to the question. In arriving at the *rule of law* as to the damage that parties to contracts are *entitled to*, as a matter of *legal right*, upon breach thereof, a consideration of anything that might or might not *in fact* have prevented the wrongful breach has nothing to do with the subject whatever. But we are to look to and consider the *mutual rights* of the parties from the inception of the contractual relations between them, down through the contract itself, to the breach complained of. One of the primary *rights* that *each party* has, who is about to enter into a contract with another, a breach of which may result in damage, is to be so situated that he may foresee what direct probable results will reasonably, and in the usual course of events, follow bad faith, neglect, or other breach upon his part. Why? Not that it will or will not *in fact* deter him from being delinquent, but that he may, if he will, so act as to *guard against and avoid, for his own benefit*, the foreseen, calamitous consequence, or that he may, if he does not, be held to have *knowingly and willingly* subjected himself to the *contemplated* consequences of his wrong, that from being foreseen and contemplated, the law will impute his consent thereto.

That the rule formulated in *Hadley v. Baxendale*, *supra*, is the one properly applicable to the contracts of telegraph companies for the transmission of messages, has the sup-

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port of the overwhelming weight of the decided cases, not only as to the numerical strength of the decisions concurring therein, but in the logical soundness of the reasoning upon which their conclusions rest, as will be seen from the following authorities: *W. U. Tel. Co. v. Hall*, 124 U. S. 444; *Sanders v. Stuart*, L. R. 1 C. P. Div. 326; *Behm v. W. U. Tel. Co.*, 8 Biss. 131; *White v. W. U. Tel. Co.*, 14 Fed. Rep. 710; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; *W. U. Tel. Co. v. Graham*, 1 Cal. 230 (S. C., 9 Am. Rep. 236); *First National Bank v. Telegraph Co.*, 30 Ohio St. 555 (S. C., 27 Am. Rep. 485); *Candee v. W. U. Tel. Co.*, 34 Wis. 471 (S. C., 17 Am. Rep. 452); *Daniel v. W. U. Tel. Co.*, 61 Tex. 452 (S. C., 48 Am. Rep. 305); *Beaupre v. Pacific & Atlantic Tel. Co.*, 21 Minn. 155; *True v. Telegraph Co.*, 60 Maine, 9; *Squire v. W. U. Tel. Co.*, 98 Mass. 232; *U. S. Tel. Co. v. Wenger*, 55 Pa. St. 262; *Tyler, Ullman & Co. v. W. U. Tel. Co.*, 60 Ill. 421; *U. S. Tel. Co. v. Gildersleve*, 29 Md. 232; *W. U. Tel. Co. v. Kirkpatrick*, 76 Texas, 217; *Cameron v. Telegraph Co.*, 100 N. C. 300; *Landsberger v. Magnetic Tel. Co.*, 32 Barb. 530; *Manville v. W. U. Tel. Co.*, 37 Iowa, 214; *W. U. Tel. Co. v. Edsall*, 63 Texas, 668; *Hibbard v. W. U. Tel. Co.*, 33 Wis. 558; *Thompson v. W. U. Tel. Co.*, 64 Wis. 531; *Abeles v. W. U. Tel. Co.*, 37 Mo. App. 554; *W. U. Tel. Co. v. Cornwell*, 2 Col. App. 491; 3 Sutherland on Damages, 298; Wood's Mayne on Damages, 40; Thompson's Law of Electricity, sections 311 to 316 and sections 346 and 358 to 375 inclusive. Opposed to this array of authorities are the following decisions by divided courts, with the exception of the Georgia and Mississippi cases: *W. U. Tel. Co. v. Hyer Bros.*, *supra*; *Daugherty v. Am. Union Tel. Co.*, 75 Ala. 168 (S. C., 89 Ala. 191; 7 South. Rep. 660); *W. U. Tel. Co. v. Way*, 83 Ala. 542 (4 South. Rep. 844); *W. U. Tel. Co. v. Fatman*, 73 Ga. 285; *Alexander v. W. U. Tel. Co.*, 66 Miss. 161 (5 South. Rep. 397). The case of *W. U. Tel. Co. v. Reynolds*, 77 Va. 173, is also cited as sustaining a contrary rule, but a careful reading of that case will disclose the fact that the conclusions reached

are predicated upon a statutory provision in their Code. In the case at bar, the message that it is alleged the defendant company failed to send was in cipher, and contained nothing that would indicate to the defendant's operator whether it contained a criticism upon the "Horse Fair" painting by the great artist, Rosa Bonheur, named in the message, or whether it related to a matter of dollars and cents. There was no explanation made to the operator as to its meaning or importance, except that the plaintiff said that the word "gladfulness," in the message had a special meaning. What that special meaning was, he did not disclose. Under these circumstances, all that the plaintiff could rightfully recover for the defendant's failure to send or deliver the message would be nominal damages, or, at most, the sum paid by him as the price of its transmission. It was error, therefore, for the court to admit testimony as to the damage sustained by the plaintiff by the loss of sale of a cargo of timber consequent upon the failure to forward the message.

There is another feature presented in the proofs, aside from all that has been said upon the rule of damages in such cases, that would prevent the recovery had in this case. The plaintiff himself testifies that he received from his agent, Dobell, in Europe, an *offer* for the cargo of timber. What that offer was, is nowhere stated or shown. Then he says: "I decided to *make a final proposition*, which I did by taking the message to the telegraph office, that was not sent, which message, when translated, *was an offer by me* of said cargo of timber for sale at 54 shillings per load." Then he says that he missed the sale of the cargo *at the terms offered by him in his message* in consequence of the defendant's failure to send it, and consequently, had to sell on the market for the best price he could get, which was 52 shillings per load. There is not a word of proof in the record to show that *his offer* contained in the unsent message would ever have been accepted, or that he could ever at any time have sold the timber at the price at which he so offered it, or that it could ever have

been sold at any greater price than the one he actually received for same, whether his message had been sent or not. Yet, in the face of this state of the proofs damages have been allowed to the plaintiff equal to the difference between a price at which he simply *offered* his timber for sale and the price actually received by him for it, without a word of proof to show whether the higher price at which he *offered it for sale* could ever have been obtained for it or not.

The appellee contends that because of the decision in *W. U. Tel. Co. v. Hyer Bros.*, *supra*, the question of damages cannot be considered; that as to this case, it is *stare decisis*. This doctrine, as we understand it, is properly applicable to decisions furnishing rules of property, and those construing statutes, and to those passing upon the validity of contracts in which investments have or may have been made upon the faith of the adjudication as to their validity, in which cases former decisions upon the same questions will be adhered to, but we do not think this case falls within the rule.

In reversing the former ruling of the court in *Hyer Bros.*, we do not interfere with any *vested right, acquired* upon the faith of that adjudication, but pass upon the rule of damages, as upon an abstract proposition, to follow the breach of such contracts. Of the erroneousness of the rule laid down in that case, we are perfectly and clearly satisfied; and in such case in determining the propriety of overruling it as a solemn adjudication, we are to be governed largely by a consideration of the results that will likely flow from the enunciation and establishment of the one or the other of the two rules. If, in such case, we conclude that the affirmance of what we deem to be the erroneous rule in that case will be productive of more far-reaching and harmful results than would follow the disaffirmance thereof, then it becomes our duty to overturn it. And such we think would be the result here. Besides being unilateral and wholly unfair, as we have before stated, we cannot see why, if the protection of the rule in *Hadley v.*

Baxendale is to be withheld from contracts with telegraph companies, it should not also be denied in the daily recurring contractual controversies between individuals. To overturn the rule in controversies as between man and man would be such an uprooting of the old landmarks as to make it impracticable to surmise the harmful results that would follow. Entertaining these views, we do not think that the doctrine of *stare decisis* constrains us to adhere to the rule in *Hyer Bros.*, but think that less harm will follow our return to the well-beaten and familiar track that furnishes a plain and easily comprehended rule for all contracting parties, be they corporate or individual.

The judgment appealed from is reversed, and a new trial ordered.

RANEY, C. J. (concurring): A reconsideration of the question of the measure of damages involved here confirms the correctness of the view expressed in my dissenting opinion in *W. U. Tel. Co. v. Hyer Bros.*, 22 Fla. 649 *et seq.*, (1 South. Rep. 129), and I concur in the opinion of Judge TAYLOR that the rule followed in the case mentioned is unfair, and ought not to be perpetuated; and, without committing myself further upon the question of *stare decisis*, my conclusion is that more injury will result in the future from adhering to the rule of the *Hyer* case than will accrue to parties to past transactions from changing it, and that the judgment should be reversed. Cooley's Con. Lim. (5th ed.), 65, and note 1; Wells on Stare Decisis, section 624, *et seq.*; Chamberlain on Stare Decisis, 19.

MABRY, J., dissented.

NOTE.—See note to next case.

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**INTERNATIONAL OCEAN TELEGRAPH COMPANY, Appellant,
v. CHARLES SAUNDERS, Appellee.**

Florida Supreme Court, Nov. 28, 1893

(32 Fla. 434.)

DELAY OF TELEGRAM.—DAMAGES.—MENTAL SUFFERING.

(Head-note by the court):

In an action sounding in tort, but for compensative damages for the breach of a contract by a telegraph company to promptly send or deliver a telegraphic message, mental pain and suffering is not an element of damages for which a recovery can be had. And, where the failure of a telegraph company to promptly send or deliver a telegram according to its contract results in no other damage than mental pain and suffering, the only recovery that can be had would be nominal damages; or, at most, the price paid for the transmission of the message. MABRY, J., dissenting. The person to whom a telegram is sent can maintain an action for whatever legal damage results to him from the negligence of the [company in its transmission or delivery, where the message shows that he is interested in it, or that it is for his benefit, or that damage will result to him from such negligence.

Cases of this series cited in opinion: *So Relle v. W. U. Tel. Co.*, vol. 1, p. 348; *Gulf, &c. Co. v. I. Levy*, vol. 1, p. 536; *Stuart v. W. U. Tel. Co.*, vol. 2, p. 771; *W. U. Tel. Co. v. Cooper*, vol. 2, p. 795; *W. U. Tel. Co. v. Broesche*, vol. 2, p. 815; *W. U. Tel. Co. v. Simpson*, vol. 2, p. 819; *Wadsworth v. W. U. Tel. Co.*, vol. 2, p. 786; *Reese v. W. U. Tel. Co.*, vol. 3, p. 640; *Chapman v. W. U. Tel. Co.*, vol. 3, p. 670; *Young v. W. U. Tel. Co.*, vol. 3, p. 734; *Burnett v. W. U. Tel. Co.*, vol. 3, p. 687; *Russell v. W. U. Tel. Co.*, vol. 1, p. 553; *West v. W. U. Tel. Co.*, vol. 2, p. 588; *Chase v. W. U. Tel. Co.*, vol. 3, p. 817; *Crawson v. W. U. Tel. Co.*, vol. 3, p. 820.

APPEAL by defendant below from judgment of Circuit Court, Brevard county. Facts stated in opinion.

John E. Hartridge and Jones & Atkinson, for appellant.

D. L. Gaulden, for appellee.

Telegraph Co. v. Saunders.

TAYLOR, J.: The appellee sued the appellant, in case, for its alleged negligence in not promptly delivering to him a telegram transmitted over its line. The plaintiff recovered judgment for \$1,200, and from such judgment the defendant company appeals.

The declaration is as follows: "The defendant, Charles Saunders, by D. L. Gaulden, his attorney, sues the International Ocean Telegraph Company, for that whereas the defendant, on the 4th day of October, A. D. 1890, was possessed of and using and operating a certain telegraph line extending from the city of Jacksonville, Duval county, State of Florida, to the town of Titusville, Brevard county, State of Florida; that said two places are distant from each other about 160 miles, and are connected by direct line of said defendant telegraph company and the Jacksonville, Tampa & Key West Railway. That plaintiff's wife, Alice J. Saunders, on the said 4th day of October, 1890, was seized with a mortal malady in the said city of Jacksonville, and that about the hour of seven o'clock on the morning of October 4th, 1890, the superintendent of St. Luke's Hospital presented to the defendant the following message, to wit:

" JACKSONVILLE, Fla., Oct. 4th, 1890.

Charles Saunders, Titusville: Wife dying; come at once, or send wishes by wire.

[Signed],

Superintendent St. Luke's Hospital."

"That said message was accepted by the defendant for immediate transmission and delivered to him at Titusville at the full rate charges or toll, and that through the gross, wanton and reckless negligence of defendant, and in palpable violation of its duty, the message was held by the defendant, and not delivered to him until about the hour of half-past nine o'clock on the night of the sixth day of October, A. D. 1890. That said message was received at said Titusville office on the morning of the fourth day of October, 1890, at half-past eight o'clock, but was not delivered to him for over sixty hours after the same was received at the Titusville office. That his said wife died in the city

of Jacksonville on the 6th day of October, 1890, and hence said message was not delivered to him, or received by him, until ten and a half hours after his wife's death. That there was only one train leaving Titusville each day, at the hour of nine o'clock A. M., for the city of Jacksonville, which said train arrived in Jacksonville at the hour of half-past six o'clock P. M. That had said message been delivered promptly, he could have arrived in Jacksonville on Saturday night, October 4, 1890. That by reason of this negligence and breach of duty on the part of the defendant, he was prevented from telegraphing to said superintendent his wishes, and was prevented from attending his dying wife and ministering to her in her last hours, and also from making desired preparations for her interment. That said message was sent by the superintendent of St. Luke's Hospital, and he paid defendant full rates or toll therefor, to wit, the sum of forty cents at the Titusville office, and as said defendant failed to deliver said message promptly, and notified the said superintendent of St. Luke's Hospital that said message had not been delivered and collected the sum of forty cents charges on said message, which said forty cents was charged to plaintiff by said superintendent, and which he had to pay, thereby entailing a loss of forty cents on this plaintiff. By reason of which said defaults, wrong and negligence on the said defendant's part, plaintiff incurred a loss and damage of the said forty cents paid as aforesaid on account of the charges made and collected from said superintendent of St. Luke's Hospital, which plaintiff had to pay as a legitimate charge against him. And, besides this, the plaintiff suffered great damage by reason of said wrong and injury so done by the defendant to his affections and feelings; and the plaintiff then and there suffered great damage, in anguish and pain of mind, by reason of the said negligence and wrong so done him by defendant. That while his said wife was dying she was deprived of that care, attention, consideration, and consolation which she would have received but for said negligence of said defendant in failing to deliver said message

promptly as aforesaid, and that by reason thereof he was damaged, in that he suffered great mortification, anguish, and pain of mind, and injury to his feelings and affections, in not being able to be with his said wife in her dying hours, and in not being able to make preparations for his wife's funeral and interment, all of which damaged plaintiff in the sum of \$1,995," etc.

At plaintiff's request the following instruction was given to the jury: "If, from the evidence, you believe that the superintendent of St. Luke's Hospital sent the following message to the plaintiff: 'Wife dying; Come at once, or send wishes by wire,' and said message was accepted by the defendant for transmission, and the toll or charges on same was paid to defendant, and this message was negligently delayed in delivery by defendant company, whereby plaintiff, Saunders, was prevented from attending his dying wife, and from making desired preparations for her funeral, the plaintiff, Saunders, would be entitled to recover for the wrong and injury done his feelings, and for the mental anguish and pain of mind suffered by him; and in making up your verdict you must take into consideration all the testimony, and fix his damages, if any, at such amount as you think, from the evidence, is just, reasonable, proper, and fair." To this charge, exception was taken, and the error assigned thereon presents the real issue involved in the cause: Can an action be sustained, and can damages be admeasured, for the breach of a contract that results *in mental suffering alone*, without any accompanying physical injury or suffering, and without any concomitant damage to the person, character, reputation or property?

The Supreme Court of Texas, in *So Relle v. Western Union Tel. Co.*, 55 Tex. 308 (decided in 1881), a case in which the telegraph company negligently failed to promptly deliver a telegram informing plaintiff of the death of his mother, and summoning him to meet a conveyance at a certain point that night, that would carry him to where the remains of his mother were, in time to attend her funeral, first led off with an affirmative answer to the

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question. The court in that case asserts that it is the settled rule of law in that State that injury to the feelings, caused by the *wilful* neglect or fault of another, constitutes such actual damages, for which a recovery may be had, and cites as authority for such assertion the cases of *Hays v. H. & G. N. R. R. Co.*, 46 Tex. 279, and *H. & G. N. R. R. Co. v. Randall*, 50 Tex. 261. In neither of these cases is the doctrine either settled or asserted that injury to the feelings, or mental suffering, *alone*, can be made the subject of a suit for *compensative* damages. The case of *Hays, supra*, was against a railroad company for damages for wrongfully and forcibly ejecting the plaintiff from its passenger train in the presence of his wife and family, in which it was claimed that the ejection was done in a rude and insulting manner and by personal violence, resulting in injuries to plaintiff's clothing and bruises to his person. Exemplary or punitive damages were claimed and the jury were instructed to estimate the *actual* damages by the "injuries sustained by the plaintiff in his person, his estate, and his feelings," and it was held that by this charge the subject of the amount of actual damages was fairly placed before the jury. But nowhere is it asserted that mental suffering *alone* can be made an independent basis for admeasuring damages. The case, like many others *founded on tort* that might be cited, simply holds that mental suffering or injured feelings may be taken into consideration as an element of damage, *when coupled with* or accompanied by substantive injury to the person or estate, upon the ground, as stated in the authorities, that in such cases the mental suffering growing out of and produced by the physical injury is so interwoven with the latter that it is impossible to consider the one without contemplating the other. *City of Salina v. Trosper*, 27 Kan. 544; *Mulford v. Clewell*, 21 Ohio St. 191; *Canning v. Williamstown*, 1 Cush. 451; *I. & St. L. R. R. Co. v. Stables*, 62 Ill. 313; *Johnson v. Wells, Fargo & Co.*, 6 Nev. 224; *Kennon v. Gilmer*, 131 U. S. 22; *Trigg v. St. L., Kansas City & Northern Ry. Co.*, 74 Mo. 147. The same may be said of the case of

Randall, supra. In that case the plaintiff, a brakeman on the defendant's trains, sued the company for damages for its negligence in having an open ditch across its track, into which he fell while performing the duty of coupling two of defendant's cars, and whereby his arm was run over and crushed by the cars, necessitating its amputation. In that case, too, the doctrine is sanctioned that an element of the verdict may be compensation for the *mental and physical suffering caused by the injury*. But nowhere is the doctrine sanctioned that mental suffering alone can sustain an action. For the support of its ruling in the So Relle case the Texas court next quotes at length the dictum of the authors of Shearman & Redfield on Negligence, which dictum — as originally incorporated in their work — was entirely without the support of any adjudged case. The seduction case of *Phillips v. Hoyle*, 4 Gray, 568, is next invoked to the support of the Texas court, where injury to the feelings of the parent in consequence of the daughter's seduction was held to be an element of damages. The fact *seems* to have been overlooked, in citing this case to its support, that in cases of seduction, and other *torts* independent of contract, *injured feelings* are given consideration, not so much as a criterion for the admeasurement of *compensation*, but as a standard by which to estimate the *enormity of the outrage* wilfully committed, and as a guide whether the damages to be allowed *as punishment* shall be higher or lower. The next and last authority cited to the support of the So Relle case is the case of *Roberts v. Graham*, 6 Wall. 578; but we fail to find in it any reference whatever to the subject of damages for injured feelings or mental suffering, the whole case being confined to a discussion of the question of the sufficiency of the allegations of a declaration or complaint for general damages as a predicate for the introduction of proof of special damage. The doctrine of the So Relle case has for its support, then, in reality, only the unsupported dictum of Messrs. Shearman & Redfield in their work on Negligence.

In the case of *Gulf, C. & Santa Fe Ry. Co. v. Levy*, 59 Tex.

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563, decided in 1883, the *So Relle* case was expressly overruled in so far as it held that an action for mental suffering alone could be maintained. In *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, decided in 1886, the *Levy* case, *supra*, is practically overruled; and the court, without the support of any additional authorities, returns to the doctrine of the *So Relle* case. The ruling in *Stuart v. Western Union Tel. Co.* has been adhered to in that State ever since, incumbered, however, with finely drawn distinctions that seem to keep an even pace with the rapid increase of litigation that the enunciation of such a doctrine would naturally engender. *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; *Western Union Tel. Co. v. Broesche*, 72 Tex. 654; *Western Union Tel. Co. v. Simpson*, 73 Tex. 422; *Western Union Tel. Co. v. Feegles*, 75 Tex. 537. In *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181, the Circuit Court of the United States for the Western District of Texas, the same doctrine is announced upon the authority alone of the holdings of the Supreme Court of that State.

The Supreme Court of Tennessee, in *Wadsworth v. Telegraph Co.*, 86 Tenn. 695, by a divided court, next follow the Texas doctrine, citing only the dictum of Shearman & Redfield in addition to the Texas cases. The dissenting opinion of Judge LURTON in that case is unusually forceful and clear, and, according to our view, states the true rule in an argument that is unanswerable.

The Supreme Court of Indiana, in *Reese v. Western Union Tel. Co.*, 123 Ind. 294, next follows the Texas doctrine, citing only the cases from that State, with the additional case from Tennessee.

The Supreme Court of Kentucky, in *Chapman v. Western Union Tel. Co.*, 30 Am. & Eng. Corp. Cases, 626, next cite and follow the Texas and Tennessee cases.

The Supreme Court of North Carolina, in *Young v. Western Union Tel. Co.*, 107 N. C. 370, next cite and follow the Texas cases; citing to its support also the cases from Tennessee, Kentucky and Indiana, that, it will be remembered, are predicated upon the Texas cases.

In *Stuart v. Western Union Tel. Co.*, *supra*, the liability of telegraph companies to damages for mental suffering caused by their failure to transmit or deliver telegrams is put expressly and pointedly upon the ground, that the mental suffering produced by the company's breach of its contract was within the *contemplation* of the company at the time it made the contract as the result that would naturally follow a breach of it.

Would the Texas court award damages to one individual for the poignant mental sting resulting from being wilfully, publicly and deliberately taunted on the street by an irate enemy with the insult that he was a cowardly cur, simply because the mortification and wounded feelings that would surely follow were *within the contemplation of the insulter*? We apprehend not; and yet in the latter case the deliberate *purpose* of the insulter would be to produce such mental anguish. To draw the comparison closer still: An individual borrows his neighbor's money, agreeing to pay at a given day, knowing in advance that his default then will surely result in the mind-harrowing tortures to his accommodating friend of utter financial ruin—a species of suffering that unfortunately, to many, is far more acute than any connected with the ties of kinship—could damages be allowed in that case for the mental torture, simply because the borrowing friend *contemplated*, and *knew* that it would follow, as the result of a breach of his contract to pay? Certainly not; and yet such is the effect of the doctrine announced in the Stuart case when followed to its logical result. Suppose a mother, whose child is critically ill, contracts with her neighbor, at a stipulated price paid in advance, to summon her husband, temporarily absent some distance away, and the neighbor delays complying with his contract until after the death and burial of the child, would damages be awarded against him to compensate the parents for the mental anguish suffered by them in consequence of the absence of the husband under such circumstances? We apprehend not. And if not in the case of the violated

contract between individuals, where is the reason for applying a different rule where one of the contracting parties is a telegraph company? In all of these cases, taking them up *seriatim*, in the order in which they were rendered, there is a conspicuous absence of anything like a logical reason upon which to base the newly announced doctrine of allowing *compensative* damages for injured feelings alone. They simply follow each other without the addition of any new light, or other attempt at *reason* for the thing, than is contained in the parent Texas case. None of them undertake to invent any crucible in which mental pain can, with anything like judicial accuracy, be converted into *compensative* dollars; but all of them are plethoric with argument admirably suited to cases that call for the infliction of *punishment*, with none to guide us to the door for *just compensation*. Yet, as a matter of course, none of them pretend to ground the right of recovery upon the idea that the infliction of punitive or exemplary damages is permissible in such cases.

It should not be lost sight of, in considering this class of cases, that, although the action, as in the present case, is *in form ex delicto*, its *foundation is a contract*, and that, in *substance*, it is an action *ex contractu* for *compensatory* damages for the breach of such contract, tort being defined to be "a wrong *independent* of contract." Addison on Contracts (7th ed.), 1. We should keep closely in mind, also, that in actions sounding in tort, but growing out of contracts, with the single exception of the breach of contract to marry, that in this respect is *sui generis*, exemplary or *punitive* damages are never permitted, but only the actual damage resulting from the breach. Field on Damages, sec. 94; 3 Parsons on Contracts, sec. 180; Lawson on Contracts, sec. 463. With these principles in mind, and in view of the utter impossibility of either proving or affixing a monetary valuation upon mental suffering, it seems apparent that, in order to sustain the money award therefor, we must do so, necessarily, without proof, and are driven to the necessity of confessing that a jury, in awarding it, can

not be governed by any other guide or check than that dictated by whim or arbitrary caprice, the same latitudinous and uncertain field in which they are left when dealing with a case calling for *punishment* instead of compensation.

In *Lynch v. Knight*, 9 H. L. Cases, 577, Lord WENSLEYDALE says: "Mental pain or anxiety the law can not value, and does not pretend to redress, when the unlawful act causes that alone, though where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested." In *Blake v. Mid. Ry. Co.*, 10 Eng. Law & Eq. 437, where a widow sued for the death of her husband, under the statute of the 9th and 10th Victoria, c. 93, allowing damages in such cases, Lord COLERIDGE says: "The jury, in assessing the damages, are confined to injuries of which *a pecuniary estimate can be made*, and can not take into their consideration the mental suffering occasioned to the survivors by his death." *Wyman v. Leavitt*, 71 Me. 227; *Johnson v. Wells, Fargo & Co.*, 6 Nev. 224; *Webb v. Denver & Rio Grande Ry. Co.* (Utah.), 44 Am. & Eng. R. R. Cases, 683.

In *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447, a libel case, in which Chief Justice COOLEY concurred, Judge CAMPBELL, delivering the opinion of the court, says: "The injury to the feelings is only allowed to be considered in those *torts* which consist of some voluntary act, or very gross neglect, and practically depends very closely on the degree of fault evinced by all the circumstances." From these authorities it seems to have been the settled rule of law, prior to the doctrine applied by the Texas courts to the breach of contracts by telegraph companies for the transmission or delivery of telegraphic communications relating to domestic affairs, that *mental suffering* was never allowed to be considered as an element of damages for which *pecuniary compensation* could be awarded, except (1) in cases of *torts*, where there was some physical injury and bodily suffering; in which cases, whether there were

any circumstances justifying exemplary damages or not, the mental suffering *incident to, connected with, and flowing directly from* the physical injury was permitted to be considered *in connection with the physical pain*, both *taken together*, but not the one disconnected from the other; and (2) in cases founded *purely in tort*, where the negligence was so gross as to reasonably imply malice; or where, from the entire want of care or attention to duty, or great indifference to the persons, property or rights of others, such malice will be imputed as would justify the assessment of exemplary or punitive damages; and (3) in cases *growing out of contract*, in the *one exceptional case* of the breach of a contract to marry.

It is impossible for us to conceive of a case where *compensation* only, in its strictest sense, for the breach of a contract, is sought for, and in which the only element of injury is temporal mental pain, how any award for such mental suffering can be sustained on the theory of *compensation*, without violating the fundamental principles of the law in the administration of civil redress. One of these principles is that verdicts awarding pecuniary compensation, strictly speaking, must be supported by competent proofs. Can the extent of monied value of mental anguish be established, even approximately, by any known method of legal proofs? If not, then the verdict assigning to it a value in dollars and cents cannot stand, because of the want of proof to sustain it. Because of this, as it seems to us, insurmountable difficulty, we cannot agree with the Texas and other courts that have followed her in sustaining pecuniary awards for mental suffering that are wholly unsupported by any recognized legal proofs. In this view of the law, we are fully sustained by the able opinion of Judge Cooper in *Western Union Tel. Co. v. Rogers*, 68 Miss. 748, in which the authorities are exhaustively reviewed and tersely criticised, and by the following cases: *Burnett v. Western Union Tel. Co.*, 39 Mo. App. 599; *Russell v. Western Union Tel. Co.*, 3 Dak. 315; *West v. Western Union Tel. Co.*, 59 Kan. 93; *Chase v. Western Union Tel. Co.*,

44 Fed. Rep. 554 ; *Crawson v. Western Union Tel. Co.*, 47 Fed. Rep. 544 ; *Owen v. Henman*, 1 Watts and Serg. 548. See, also, the exhaustive opinion by Justice LUMPKIN, of the Supreme Court of Georgia, rendered in March, 1892, in *Chapman v. Western Union Tel. Co.*, 88 Ga. 763.

In the case under consideration, the plaintiff's suit, though sounding in tort, is for *compensation* only, for the breach by the defendant telegraph company of its contract promptly to deliver a telegram summoning him to the death-bed of his wife. His only injury, resulting directly from such breach of contract, was mental suffering and disappointment in not being able to attend upon his wife in her last moments, and to be present at her funeral. The resultant injury is one that soars so exclusively within the realms of spirit land that it is beyond the reach of the courts to deal with, or to compensate by any of the known standards of value. It presents a class of cases where legislative action fixing some standard of recovery would be highly appropriate ; but, until this action is taken, we do not feel that the courts are authorized to so widely diverge from the circumscribed limits of judicial action as to undertake to mete out compensation in money for the spiritually intangible. Under these circumstances, we do not think that the plaintiff was entitled to any other than nominal damages, or, at most, the cost of the message whose delivery was delayed. The charge of the court that was excepted to was erroneous. This disposes of the main question involved. Upon the other question presented, as to whether the person to whom a telegram, like the one involved herein, is sent can maintain an action for any legal damage that may result to him from the negligence of the company in its transmission or delivery, we are of opinion that he can, where the message shows that he is interested in it, or that it is for his benefit, or that damage will result to him from its negligent transmission or delivery. Gray on Communication by Telegraph, section 65, and citations ; Thompson on Law of Electricity, sections 426, 428 *et seq.*, and citations.

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The judgment of the court below is reversed, and a new trial ordered.

MABRY, J., dissented, and wrote an opinion.

NOTE.—See INDEX, title "Mental Distress."

The only Florida case which has appeared in this series, prior to the two cases last above, is *W. U. Tel. Co. v. Hyer Bros.*, vol. 2, p. 484.

CARLETON B. CHAPMAN V. THE WESTERN UNION TELEGRAPH COMPANY.

Georgia Supreme Court, March 26, 1892.

(88 Ga. 763.)

DELAY OF TELEGRAM.—DAMAGES.—MENTAL SUFFERING.

(Head-note by the court):

A person to whom a telegraphic message was addressed and sent informing him of the desperate illness of his brother and requesting him to come, is not entitled to recover of the telegraph company damages on account of mental pain and suffering, alleged to have resulted to the plaintiff from failure of the company to deliver him the message in due time, and from delaying delivery till too late to take the last train available for reaching the brother before his death occurred.

Cases of this series cited in opinion: *So Relle v. W. U. Tel. Co.*, vol. 1, p. 348; *Gulf, &c. Co. v. J. T. Levy*, vol. 1, p. 548; *Same v. I. Levy*, vol. 1, p. 586; *Stuart v. W. U. Tel. Co.*, vol. 2, p. 771; *Loper v. W. U. Tel. Co.*, vol. 2, p. 791; *W. U. Tel. Co. v. Cooper*, vol. 2, p. 795; *W. U. Tel. Co. v. Broesche*, vol. 2, p. 815; *W. U. Tel. Co. v. Simpson*, vol. 2, p. 819; *W. U. Tel. Co. v. Adams*, vol. 1, p. 442; *W. U. Tel. Co. v. Rosentreter*, vol. 3, p. 782; *W. U. Tel. Co. v. Jones*, vol. 3, p. 794; *Chapman v. W. U. Tel. Co.*, vol. 3, p. 670; *Young v. W. U. Tel. Co.*, vol. 3, p. 734; *Thompson v. W. U. Tel. Co.*, vol. 3, p. 750; *Sherrill v. W. U. Tel. Co.*, vol. 3, p. 759; *Wadsworth v. W. U. Tel. Co.*, vol. 2, p. 736; *W. U. Tel. Co. v. Henderson*, vol. 3, p. 570; *Reese v. W. U. Tel. Co.*, vol. 3, p. 640; *Logan v. W. U. Tel. Co.*, vol. 1, p. 235; *West v. W. U. Tel. Co.*, vol. 2, p. 588; *Russell v. W. U. Tel. Co.*, vol. 1, p. 653; *Chase v. W. U. Tel. Co.*, vol. 3, p. 817; *Crawson v. W. U. Tel. Co.*, vol. 3, p. 820; *W. U. Tel. Co. v. Taylor*, vol. 3, p. 604.

APPEAL by plaintiff from judgment of City Court of Macon. Facts stated in opinion.

Hardeman, Davis & Turner, for plaintiff.

Gustin, Guerry & Hall, for defendant.

LUMPKIN, Justice: The exact question, briefly stated, is whether a person to whom a telegraphic message announcing the dying condition of a brother was sent, but by gross negligence of the company was not delivered with due promptness, so that he was unable to reach the brother's bedside before death transpired, can recover substantial damages for the mental suffering caused by the company's failure of duty. The plaintiff does not claim to have sustained any pecuniary loss, but seeks recompense for the mental anguish due to losing the opportunity of being with his brother in his last hours.

The question has not been ruled on by this court. The expressions used in *Cooper v. Mullins*, 30 Ga. 152, do not cover it, because that was a case of physical injury. But there is no lack of authority in other jurisdictions. The trouble lies in the directly opposite views of the several learned courts which have passed upon the question. Consequently the two conflicting lines of decision may be compared to ascertain which is the more consonant with long-established and well-recognized principles. The Supreme Court of Texas, in 1881, held that damages are recoverable for such an injury. So *Relle v. W. U. Tel. Co.*, 55 Tex. 308 (40 Am. Rep. 805). No direct authority is cited for this ruling, but the court adopts as law a bare suggestion made by the text writers, Shearman & Redfield, in their work on Negligence, vol. 2, sec. 756. The cases referred to in the opinion were actions for physical injuries, of which the mental agony forms an inseparable component. But the decision is followed with more or less restriction by the same court in numerous later cases: *Gulf R. Co. v. Levy* (2 cases), 59 Tex. 542, 563 (46 Am. Rep. 269, 278); *Stuart*

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v. *W. U. Tel. Co.*, 66 Tex. 580 (59 Am. Rep. 693); *Loper v. Same*, 70 Tex. 689 (8 S. W. Rep. 601); *W. U. Tel. Co. v. Cooper*, 71 Tex. 507 (9 S. W. Rep. 598; 10 Am. St. Rep. 772); *Same v. Broesche*, 72 Tex. 654 (10 S. W. Rep. 734); *Same v. Simpson*, 73 Tex. 422 (11 S. W. Rep. 385); *Same v. Adams*, 75 Tex. 533 (12 S. W. Rep. 857); *Same v. Feegles*, 75 Tex. 537 (12 S. W. Rep. 860); *Same v. Moore*, 76 Tex. 66 (12 S. W. Rep. 949); *Same v. Richardson*, 79 Tex. 649 (15 S. W. Rep. 689); *Same v. Rosentreter*, 16 S. W. Rep. 25; *Same v. Jones*, 16 S. W. Rep. 1006; *Erie Tel. Co. v. Grimes*, 17 id. 831; *Potts v. W. U. Tel. Co.*, 18 id. 604. This doctrine has involved the court in some inconsistencies, as shown by the opinion in *W. U. Tel. Co. v. Rogers*, 68 Miss. 748 (9 So. Rep. 823), and by Judge THOMPSON's article on the subject in 33 Cent. L. J. 5. Compare cases of Stuart, Adams, Feegles, Moore, Rosentreter and Potts, *supra*, with those of Kirkpatrick, 76 Tex. 217 (13 S. W. Rep. 70); Brown, 71 Tex. 723 (10 S. W. Rep. 323); and Rowell, 75 Tex. 26 (12 S. W. Rep. 534). Nevertheless the Texas doctrine has gotten a strong following in other courts. *Beasley v. W. U. Tel. Co.*, 39 Fed Rep. 181 (U. S. Cir. Ct. Tex.); *Chapman v. Same* (Ky.) 15 S. W. Rep. 880; *Young v. Same*, 107 N. C. 370 (11 S. E. Rep. 1044). See *Thompson v. Same*, 11 S. E. Rep. 269; *Sherrill v. Same* (N. C.) 14 S. E. Rep. 94; *Wadsworth v. Same*, 86 Tenn. 695 (6 Am. St. Rep. 864); *Same v. Henderson*, 80 Ala. 510 (18 Am. St. Rep. 148); *Reese v. Same*, 123 Ind. 294 (24 N. E. Rep. 163); Thompson on Electricity, § 378 *et seq.* The Alabama and Indiana courts have gone no further than holding that the sender of the message can recover for mental suffering. In Illinois it was cautiously held that nominal damages, "at least," might be recovered. *Logan v. W. U. Tel. Co.*, 84 Ill. 468. These rules involve various perplexing questions on which they do not all agree. Whether the person to whom the message is sent, as well as the sender, can recover; whether the action is grounded in contract or in tort; whether the violation of a contract involving feeling is a proper basis for awarding substantial

damages for injury to feelings alone ; to what extent the message must show on its face the family relationship ; whether the damages to be given are in their nature punitive or compensatory — these are the chief problems encountered, and solved in variant ways. Some of the cases rest on breach of contract ; of which some hold that the sendee also, being the beneficiary of the contract, can maintain the action for its violation. Cases of Henderson, Richardson, Levy, Chapman and others. This view grapples with the big question, how can one, in an action for breach of contract, recover for mere disappointment or anguish of mind resulting from the breach? See *Walsh v. Chicago R. Co.*, 42 Wis. 23 (24 Am. Rep. 376). The answer given is that the subject matter of the contract is feeling, and the damage to feeling by non-compliance was plainly in contemplation of the parties making the contract. The breach of many a contract, which the injured party desires performed, brings disappointment and blasted hopes. Yet these mental consequences, if unattended with other loss, have not usually been regarded ground of recovery. The stronger view is that the recovery, whether by sender or sendee, is had for the tort, or breach of common law or statutory duty, the contract serving merely to create the relation of duty between the parties. Cases of Young, Reese, Stuart, Wadsworth, and others. The difficulty arising here is whether, as there is no tort independently of the contract, the contract can rightly be treated as not precluding recovery in tort, and the telegraph company be dealt with, in this respect, like a common carrier. A tendency is observed to escape this difficulty by applying the code provisions which abolish the distinction between contract and tort, and allow the plaintiff to recover on a simple statement of the facts of his case. Stuart and Wadsworth cases. In this State no such abolition has been affected. Regarding the nature of the damages, the majority opinion in this class of decisions is that they are strictly compensatory, and take on the vindictive or exem-

plary feature only in cases where the injury is wilful, wanton, or malicious.

As against the above authorities, there are strong decisions denying the right of substantial recovery altogether. *West v. W. U. Tel. Co.*, 39 Kan. 93 (7 Am. St. Rep. 530); *Russell v. Same*, 3 Dak. 315 (19 S. W. Rep. 408); *W. U. Tel. Co. v. Rogers*, 68 Miss. 748 (9 So. Rep. 823); *Chase v. Same*, 44 Fed. Rep. 554 (U. S. Cir. Ct. Ga.); *Crawson v. Same*, 47 Fed. Rep. 544 (U. S. Cir. Ct. Ark.). And see able dissenting opinion of LURTON, J., in Wadsworth case, *supra*. This seems to us the sounder view of the law. It is remarkable that the opinions declaring in favor of recovery can point to no positive authority older than the first Texas decision, in 1881. They do refer to certain classes of cases where mental suffering is admitted as an element to be considered by the jury in making their estimate of the damages, namely, actions for slander or libel, for seduction, for assault without physical injury, for breach of promise of marriage, and for physical injuries. But in every one of these, it has been maintained that there is a necessary and inseparable ingredient of pecuniary injury. See *W. U. Tel. Co. v. Rogers*, *supra*. In slander and libel, where the action is founded on words not actionable *per se*, there must be proof of special damage. And where the words are actionable *per se* they have a sure tendency to degrade the citizen in the estimation of his fellows, which results in damage to his social influence and business efficiency. Besides, malice (express or implied) is an essential element in such cases. In seduction, it has been necessary from ancient times for the plaintiff to prove a loss of services, or a relation from which such loss might occur, else the action could not be maintained. Thus a brother, not standing *in loco parentis*, however great his anguish, and however keenly he may have felt the disgrace and mortification caused by the wrongdoer, could not recover for his mental suffering. In actions for technical assault, where no physical injury was inflicted or battery committed, damages are said by some of these

authorities to be given wholly for mental suffering. Yet it may be that the injury being essentially wilful, substantial damages are given by way of punishing or making an example of the wrongdoer. An assault is an active threat against the body, an offer of violence endangering the person, which the law redresses even in its initial stage, thus protecting the physical person more completely. In actions for breach of promise, the plaintiff's financial loss plays a conspicuous part. Evidence showing the defendant's station and reputed wealth is admissible. At common law, the husband on marriage assumed the wife's debts and responsibility for her torts and for support appropriate to their station. He took a large share of her property by that event, and she acquired some rights in his property. This suffices to show that the breach of marriage promise involve important pecuniary consequences. In actions for physical injuries, the great consideration is the loss of time and the diminution of capacity for work, of course allowing also for the pain endured. So far as mental suffering originating in physical injury is concerned, it is rightly treated as undistinguishable from the physical pain. On ultimate analysis, all consciousness of pain is a mental experience, and it is only by reference back to its source that one kind is distinguishable as mental and another as physical. So, in cases of physical injury, the mental suffering is taken into view. But according to good authorities, where it is distinct and separate from the physical injury, it cannot be considered. *Johnson v. Wells*, 6 Nev. 224 (3 Am. Rep. 245); *Indianapolis R. R. Co. v. Stables*, 62 Ill. 313; *Joch v. Dankwardt*, 85 Ill. 331; *Keyes v. Minneapolis R. Co.*, 36 Minn. 290; *City of Salina v. Trosper*, 27 Kan. 544; 1 Sedgw. Dam. § 44; *Trigg v. St. Louis R. R. Co.* (Mo.), 6 Am. and Eng. R. R. Cas. 345, 348; *Dorrah v. Illinois R. R. Co.*, 65 Miss. 14 (7 Am. St. Rep. 629).

In an action for wrongful attachment, on the ground that the defendant was about to dispose of his property with intent to defraud his creditors, it was held that the mortification was a part of the actual damage. *Byrne v. Gardner*, 30

La. An. 6. This was decided by three judges, one of the five being absent and another disqualified, no authority being cited save Sedgwick and the Louisiana Code. Of course it was a case of serious injury to the plaintiff's business standing, and therefore, even if sound, is no authority on the present question. In an action for false imprisonment, or for malicious arrest and prosecution, mental anguish has been held a proper subject for compensatory damages. *Fisher v. Hamilton*, 49 Ind. 341; *Stewart v. Maddox*, 63 Ind. 51; *Coleman v. Allen*, 79 Ga. 637. Of course, such injuries are essentially wilful, and besides are violations of the great right of personal security or personal liberty. Reference has been made also to cases of passengers being put off railway trains, when the mortification, insult, and wounded feelings come in to enhance the damages. From the moment the passenger is ordered to get off he is under duress; his body is not free to remain where he chooses, and where it has the right to be. It is like an illegal arrest or illegal imprisonment. In all these cases, where personal security or personal liberty is infringed, the mental suffering seems to be a necessary component in the injury. But conceding to the fullest extent that mental suffering enters as an item of damage, or is the *gravamen* of damage, in certain cases, it hardly admits of discussion to show that any deduction from them which would sanction a recovery in the present case, for mental suffering alone, would authorize a like recovery in every case attended with mental suffering. But this would be an unwarrantable extension of them; they stand each on its own ground, in well-defined limits.

In *Lynch v. Knight*, 9 H. L. 577, Lord WENSLEYDALE expressed the opinion that, where the only injury is to the feelings, the law does not pretend to give redress. Though Mr. Sedgwick (Meas. Dam. § '43 *et seq.*) seeks to restrict this language to the case then before the court, and disputes its accuracy as a general proposition, it may be questioned whether the learned author is able to cite a single case sustaining his contention. He does refer to a

number of cases, but in all of them the mental pain may be viewed as an accompaniment or part only of some substantial injury entitling the party to compensation. But, even in cases where a recovery must be had on other grounds, it is frequently held incompetent to give damages for the accompanying mental injury. Thus when a father sues for a grievous physical injury to his minor child, he cannot recover for the laceration of his parental feelings, even in conjunction with damages for the loss of service, though his mental sufferings be necessarily severe and heart-rending. *Flemington v. Smithers*, 2 C. & P. 292; *Black v. Carrollton R. R. Co.*, 10 La. An. 33 (63 Am. Dec. 586); *Penn. R. R. Co. v. Kelly*, 31 Pa. St. 372; *Oakland R. Co. v. Fielding*, 48 *id.* 320. Statutes have been passed giving recovery for homicide against the slayer; but the policy has invariably been to confine the right of action to a party sustaining pecuniary loss. And in actions on such statutes, even by the widow of the deceased, grief and anguish cannot come in for compensation. 2 Sedgw. Dam. § 573, and cases cited; Field, Dam. § 630, and cases cited; *Gillard v. Lancashire R. Co.*, 12 L. T. 356; *Blake v. Midland R. Co.*, 10 Eng. L. & Eq. 437 (18 Q. B. 93; 21 L. J. Q. B. 223); *Louisville R. R. v. Orr*, 91 Ala. 548; (8 So. Rep. 360); *Killian v. Augusta R. R. Co.*, 79 Ga. 234. Where an action was brought for injury to real estate by blasting, it was held that the plaintiff could not recover for mental anxiety for the safety of himself and family. *Wyman v. Leavitt*, 71 Me. 227 (36 Am. Rep. 303). In forcible entry and detainer, damages for mental anguish cannot be recovered. *Anderson v. Taylor*, 56 Cal. 131. But in addition to these cases, where damages for mental suffering in conjunction with other damages were refused, cases may be found denying the right to recover where the whole injury is to feeling. Thus where fright caused by negligence of the defendant was so great and sudden as to immediately produce physical sickness and suffering, it is held that damages cannot be had. The principle is that for the mere mental suffering there could be no recovery, and the

physical injury is too remote, being unlikely to result from the wrongful act. *Victorian R. Commissioners v. Coultas*, L. R., 13 App. Cas. 222; *Fox v. Borkey*, 126 Pa. St. 164 (17 Atl. Rep. 604); *Hoing v. Pittsburgh R. Co.* (Pa.), 23 Atl. Rep. 340 (34 Cen. L. J. 236; 45 Alb. L. J. 211); *Lehman v. Brooklyn R. R. Co.*, 47 Hun, 355; *Allsop v. Allsop*, 5 H. & N. 534. In Minnesota, however, fright causing nervous convulsions and illness is held to be ground for damages. But even here the action was sustained on account of the physical injury as the proximate result of the negligent act, and not on account of the intervening mental suffering, the court conceding that this alone would not warrant recovery. *Purcell v. St. Paul R. Co.*, 50 N. W. Rep. 1034. So in *Bray v. Latham*, 81 Ga. 640, an injury to health, caused by fright and physical exposure, was held ground for damages. It is hard to conceive of an injury which would wound the feelings more deeply than the disturbance and desecration of the grave of a near relative. Yet for such a wrong an action did not lie at common law. The stern doctrine was that there is no property in a corpse, and the only protection of the grave was by criminal indictment. 2 Blackst. Comm. 429; *Pierce v. Proprietors of Cemetery*, 10 R. L. 227 (14 Am. Rep. 667). It seems the owner of the lot could bring an action of trespass *quare clausum fregit*, and this was held to be the only action lying for disturbing the remains of a deceased child, additional damages being in this case allowed for injury to feeling because the act was wilful or wanton. *Meagher v. Driscoll*, 99 Mass. 281 (96 Am. Dec. 759). It would not be allowable to maintain such a suit as the present under the assumption that the injury is to the *person*. In the old division of legal wrongs, "injuries to the person" do not include everything which the word "person" may be fairly understood to cover. Thus in Ohio and Illinois there is a statute giving the wife a right of action against any person intoxicating the husband, whereby she was injured in person, property or means of support. In both States it is held that she cannot recover under such statute for mental

anguish, even when entitled to damages on other grounds, as that is not an injury to the person. *Mulford v. Clewell*, 21 Ohio St. 191; *Freese v. Tripp*, 70 Ill. 496. In Illinois some of the judges dissented from the majority opinion, but all agreed that mental anguish alone would not make a cause of action.

The law protects the person and the purse. The person includes the reputation. *Johnson v. Bradstreet Co.*, 87 Ga. 79. The body, reputation and property of the citizen are not to be invaded without responsibility in damages to the sufferer. But, outside these protected spheres, the law does not yet attempt to guard the peace of mind, the feelings or the happiness of every one by giving recovery of damages for mental anguish produced by mere negligence. There is no right, capable of enforcement by process of law, to possess or maintain without disturbance any particular condition of feeling. The law leaves feeling to be helped and vindicated by the tremendous force of sympathy. The temperaments of individuals are various and variable, and the imagination exerts a powerful and incalculable influence in injuries of this kind. There are many moral obligations too delicate and subtle to be enforced in the rude way of giving money compensation for their violation. Perhaps the feelings find as full protection as it is possible to give in moral law and a responsive public opinion. The civil law is a practical business system, dealing with what is tangible, and does not undertake to redress psychological injuries.

The case of *W. U. Tel. Co. v. Rogers, supra*, suggests that the doctrine it opposes would open up a new field of litigation. This is worthy of remark. Except in Texas, suits like this have been infrequent in the past. If their foundation principle be sanctioned, they are likely to multiply infinitely. Nowhere can be found any satisfactory suggestion of a principle to restrain such suits within reasonable limits. How much mental suffering shall be necessary to constitute a cause of action? Let some of the courts favoring recovery measure out the quantity. If

they are unable to do this, then, on principle, any mental suffering would be actionable, the degree of it merely determining the *quantum* of damages. The cases do suggest as a restriction that the plaintiff must be entitled to damages on some other ground, or to nominal damages, at least; in other words, there must be an infraction of some legal right of the plaintiff; then the damages may be increased for the mental suffering. If the plaintiff must be entitled to substantial damages on *other* grounds, then mental suffering alone is not a ground for damages, which is the very point contended for. To speak of the right to nominal damages as a condition for giving substantial damages is a palpable contradiction. To give nominal damages necessarily denies any further recovery. It is said there must be an infraction of some legal right attended with mental suffering, for this kind of damages to be given. If this be true law, why is not the mental distress always an item to be allowed for in the damages? We have seen that, though allowed in some, it is in many cases excluded. Every man knows that the violation of any material right is necessarily productive of more or less pain of mind. Then why not compensate it in every instance where a right has been violated? In no case whatever are damages recoverable unless a legal duty has been broken. By the test proposed, it is first granted that mental suffering alone is not actionable; then a case arises in which there is no actual damage, unless mental suffering be such, when it is simply assumed that it *is* actual damage. Throwing away the lame pretense of basing recovery for mental suffering upon an otherwise harmless transgression, and stripping it of all false form and confusing technicality, it is manifest that to allow such a recovery is, *in real substance*, an effort to protect feeling by legal remedy. If mental suffering be a self-sufficient element of damage, as in reason it must be to recover when no other damage is claimed, why is not the causing of mental suffering itself an infraction of a legal right? Why should the law of torts lag behind the law of damages? Can it do so in a sound system?

Our code, § 3067, declares: "In some torts the entire injury is to the peace, happiness or feelings of the plaintiff: in such cases, no measure of damages can be prescribed except the enlightened conscience of impartial jurors. The worldly circumstances of the parties, the amount of bad faith in the transaction, and all the attendant facts should be weighed." There is no further definition or description of the torts here referred to, by which any case may be recognized as of this class. But it is manifest that the language quoted does not say or imply that injury to the peace, happiness or feelings shall always be itself a tort, but rather the reverse. In view of the fact that no description or designation is attempted of this class of torts, and in view of the general purpose of the code, this section obviously does not mean to create new torts, or change the law of damages, but only to declare the pre-existing law. See *Central R. R. v. Kelly*, 58 Ga. 257; *Georgia R. R. v. Homer*, 73 Ga. 257; *Central R. R. v. Senn*, id. 712; *Coleman v. Allen*, 79 Ga. 637; *Cox v. Richmond & D. R. R.*, 87 Ga. 747. No case has been found to give an authoritative construction to this section as a whole, nor is it necessary to do so now. It suffices for present purposes to say that it does not alter the prior law.

It seems there is no public policy to be subserved by giving damages for mental suffering as a general rule, and the law does not allow it. But it is urged that the public occupation of telegraph companies creates between them and the public a special relation in which their responsibility is greater than that of other persons. So much of their business and profit is derived from the acceptance of messages involving feelings only, that, at first view, it would seem legitimate and salutary to require them to answer in damages for any dereliction of duty in this important part of their activity. The argument is that, in the exercise of a public employment, they undertake for hire to serve the feelings of their customers, and therefore ought to pay for negligent non-performance or mis-performance of this peculiar function. This reasoning is

unanswerable in so far as it proves a right of action to arise out of the breach of duty. But how about damages and the measure of damages? It can scarcely be that a new and exceptionable principle of damages emerges, *ex proprio vigore*, from unknown recesses of the law when occasion seems to require it, or that the court can do more than adapt and apply principles already existing when novel transactions, such as those which make up the business of telegraphy, become the subjects of adjudication. Precedents must be followed, else the law will become a wandering, uncertain thing. If our understanding of the law, as hitherto expounded by its accredited oracles, be correct, it would be a judicial innovation to require feelings which had, even under contract or public duty, the right to expect help, to be solaced with damages for the disappointment, however severe, at losing the promised benefit. If the subject needs new law, the law-making powers may create it; but we decline to usurp their prerogative. In fact the Legislature apparently has thought that nominal liability is not adequate to enforce the good policy of stimulating diligence in the carriage of non-financial messages, including those which affect the strongest feelings of humanity. It was, of course, a matter of general knowledge that many dispatches which the company is paid to carry, if not carried with due diligence, would entail no pecuniary loss upon sender or sendee, and therefore the company would be subjected to mere nominal liability. The Legislature recognized this as a subject for legislation, and passed the act of 1887, providing a penalty in case any message is not duly transmitted and delivered. This act gives a conventional redress of some money value, and is, perhaps, the best remedy that could be devised. It provides a penalty for punishment of the wrong doer. Of course it does not affect, to any extent, the pre-existing law of damages, and cannot be construed as superseding or modifying any right of recovery existing independently of its provisions. *Couch v. Steel*, 3 EL. & B. 402; Acts 1887, p. 111; *W. U. Tel. Co. v. Taylor*, 84 Ga. 408. If the

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remedy in terms were exclusive of all others, or if damages could be predicated on this statute which were not recoverable before, this whole discussion might have been superfluous. The record shows that the plaintiff recovered the penalty imposed by the statute, and that is all the redress to which he is entitled. Perhaps the safest expedient for a case of this kind, which involves a public policy, is to fix an arbitrary sum to be recovered by the injured person, and this the Legislature has done. See *Russell v. W. U. Tel. Co.*, 3 Dak. 315 (19 N. W. Rep. 408).

There was no error in sustaining the demurrer to so much of the plaintiff's petition as sought recovery simply for pain and anguish of mind.

Judgment affirmed.

NOTE.—See INDEX, title, "Mental Distress."
See note to next case.


D. A. STAMEY v. THE WESTERN UNION TELEGRAPH COMPANY.

Georgia Supreme Court, Jan. 8, 1894.

(92 Ga. 612.)

FAILURE TO DELIVER TELEGRAM.—RULES AND REGULATIONS.

(Head-note by the court):

Where a message, intended for transmission over the lines of a telegraph company, was written upon one of the regular blanks prepared and furnished by the company for the use of its customers, and upon the face of the blank, above the space left for the message, the following words were printed in plain type: "Send the following message, subject to the terms on back hereof, which are hereby agreed to," and below this space, in still plainer type, were printed the following words and signs, "Read the notice and agreement on back ," the writer of the message and consequently the contemplated sendee was bound by any reasonable rule or regulation printed on the back of the blank.

A regulation so printed, and in the following words, "no responsibility regarding messages attaches to this company until the same are pre-

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sented and accepted at one of its transmitting offices, and if a message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender," was reasonable, and the company is not liable to the proposed sendee of such a message because of the failure of the messenger to whom it was intrusted to deliver it at one of the company's transmitting offices, and the company's consequent failure to transmit and deliver to the person addressed. This is so, notwithstanding the delivery of messages to such a messenger was usual and customary in the regular line of the company's business, and, according to its usage, it paid its messengers for every message delivered, and "for every message so received to be transmitted." By express stipulation, the messenger was, as to the service he undertook, the agent of the sender and not of the company.

Cases of this series cited in opinion : *Hill v. W. U. Tel. Co.*, vol. 2, p. 614 ; *W. U. Tel. Co. v. Fontaine*, vol. 1, p. 229 ; *W. U. Tel. Co. v. Blanchard*, vol. 1, p. 404 ; *Clement v. W. U. Tel. Co.*, vol. 1, p. 671 ; *Grinnell v. W. U. Tel. Co.*, vol. 1, p. 70.

APPEAL by plaintiff below from judgment rendered at City Court, Richmond county. Facts stated in opinion.

J. M. Lamar, for plaintiff.

J. S. & W. T. Davidson, for defendant.

LUMPKIN, Justice : The declaration in this case claims damages for the non-transmission and non-delivery of a telegram which, it is alleged, Gooding & Co., of Charleston, S. C., had written on one of the defendant's day telegraphic blanks and handed to a messenger of the defendant, who had just delivered a telegram to them from the plaintiff, to be carried to the office of the defendant in Charleston for transmission to the plaintiff, at the latter's expense, but which message was never in fact delivered by the messenger at the transmitting office of the defendant in Charleston.

The pivotal question is : Was the message delivered to the company for transmission ? One of the rules and regulations of the company, printed on the back of the blank, upon the face of which the message was written, was in these terms : "No responsibility regarding messages attaches to this company until the same are presented and

accepted at one of its transmitting offices, and if a message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender." Just above the space left for the written message are the following words, in large type: "Send the following message, subject to the terms on back hereof, which are hereby agreed to." And at the bottom of this space is the following notice, in larger type: "Read the notice and agreement on back." The declaration avers that this rule is not obligatory upon the senders of the message, because it was not read by them or known to them. This position is clearly untenable, for reasonable diligence was all that was necessary to acquaint them with this rule. Therefore, the moment the senders wrote and signed the message on the blank, they became, in legal contemplation, aware of the rule, whether they read it or not, and thereby signified "both their knowledge of it and their assent to it." *Hill v. Western Union Telegraph Co.*, 85 Ga. 425, 428, 429, and cases cited on the latter page. See, also, Gray on Com. by Tel. 52, 53; Scott & Janigan on Law of Tel. § 149; note in 71 Am. Dec. 466, to case of *Camp v. Western Union Tel. Co.*, beginning on page 461. A telegraph company is not subject to the extraordinary limitations and responsibilities imposed by law on common carriers. *Western Union Tel. Co. v. Fontaine*, 58 Ga. 433; *Same v. Blanchard*, 68 Ga. 307, and note to same case in 45 Am. Rep. 487, 488. It therefore has the undoubted power to make reasonable rules and regulations regarding the conduct of its business with the public; and the reasonableness of such rules and regulations is a question for the courts to decide. Gray on Com. by Tel. §§ 13, 29; Scott & Jarn. on law of Tel. § 104; note in 71 Am. Dec., *supra*. This being true, is the rule in controversy reasonable? We think it is. The work performed by the messenger in carrying the message from the office or residence of the sender to the transmitting office of the company forms no part of the transmission of the message by the company,

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for which latter purpose alone the company makes a charge. There is nothing onerous or one-sided about the rule. It dictates no terms to the sender, and gives no advantage to the company. It is neither obligatory nor arbitrary. In a word, it gives the sender the alternative of delivering his dispatch to the messenger to be delivered by him at the office of the company, on the condition prescribed, or of making such delivery either in person or by his own servant. We have been unable to find a direct adjudication upon this rule by any court, and we think this shows, or tends to show, the consensus of public and professional opinion in favor of its reasonableness. The rule is held to be reasonable in the work of Gray on Communication by Telegraph, section 13, top of page 23. Assuming, then, the reasonableness of the rule, it follows, in the absence of other facts to the contrary, that the message was not delivered to the company, because it was not presented at one of its transmitting offices by the agent of the senders, and was not accepted by the company.

Now, is there any fact in this case, not yet mentioned, which should vary the above conclusion? The plaintiff in error alleges in his declaration that a local usage of the defendant at Charleston authorized its messengers, delivering telegrams, to receive answers for delivery at the company's office for transmission, for which they were paid by the company two cents for each message so received and delivered (*i. e.*, at the company's office) and that such local usage made the messengers the agents of the company to receive messages for transmission, and superseded the above recited rule or stipulation. Taking into view all the allegations of the declaration, and the blank attached, the answers referred to as being within the operation of this alleged usage were, presumably, written upon the company's blanks similar to the one in question. We cannot accept as correct the plaintiff's position as to the effect of this alleged usage. If the usage was unknown to the senders of the telegram, they

did not act, and could not have acted on it; and if they had known of such usage, and, nevertheless, entered into a written agreement by which the messenger should act as their agent for the sole purpose of carrying the message to the company's office for transmission, they and the plaintiff in error were thereby estopped from showing such usage, because custom or usage, while admissible to explain an ambiguous written agreement, is inadmissible if repugnant to or inconsistent with a clear, express agreement. *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299, 307 (S. C. 18 Am. Rep. 485, 493); and cases there cited. See, also, *Park v. Piedmont Ins. Co.*, 48 Ga. 601, 606; *Werner v. Footman*, 54 Ga. 128, 137; *Tilley v. County of Cook*, 103 U. S. 155, 162; *Moran v. Prather*, 23 Wall. 492, 503; and note to *Phoenix Ins. Co. v. Munger*, 33 Am. St. Rep., on page 368, citing ample authority and saying: "A local usage, inconsistent with an express contract made at the place where such usage prevails, or contradicting its terms, is not a part of such contract, and cannot be given in evidence to contradict or avoid it."

There is nothing in the rule under consideration contrary to public policy. Aside from the reasons already given, others in its favor may be stated:

(1) Messengers of a telegraph company are not sent out from the company's office to solicit telegrams, and, being engaged in a most subordinate work of the company's service, it is to be presumed that they are not invested by the company with the powers of receiving the company's charges or fees for the transmission of telegrams, and that they have no powers of rejecting telegrams offered to them, either for the non-payment in advance of the company's charges for transmission, or for being illegibly written, or for containing matter which would make the company liable in tort or otherwise, for transmitting an indecent or immoral telegram — all of which are powers reserved by law to the company for its protection, and with which, it is known to the public, or should be, the receiving agent of the company at its transmitting offices is invested.

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(2) The carriage of telegrams from the office or residence of the sender to the transmitting office of the company is not a part of the duty or business of a telegraph company.

(3) Neither the sender nor addressee of a message pays anything for such carriage to the transmitting office of the company.

(4) The liability against which a telegraph company cannot stipulate, as shown by the adjudications of all courts, is confined to its negligence in connection with the transmission of messages from its transmitting offices, and the delivery of such messages to the sendee; and it has even been held, in *Clement v. Western Union Tel. Co.*, 137 Mass. 463, 466, 467, that there are no principles of public policy which should prevent a telegraph company from stipulating against the negligence of its messenger boys as to the delivery of messages to its patrons.

(5) And the transmission of a message "means its transmission from the office or station at which it is received to the one to which it is sent;" and delivery means "the delivery of it to the person to whom it is addressed." Scott & Jarn. on Law of Tel. § 264.

Therefore, delivery to the messenger, without acceptance by the company, should not fix any liability on the company. If delivery to the messenger were delivery to the company, acceptance by the messenger must be held to be acceptance by the company, and this would take from the company its undoubted right to refuse to transmit a message for any one or more of the reasons above stated.

No analogy between such a case as this and that of a life insurance agent can justly be drawn, because none of the reasons which have impelled the courts, in modern decisions, to treat the agent of the insurance company as the agent of the insurer, where a somewhat similar rule or stipulation is printed upon the back of the application or policy of insurance, have any application here. For the reasoning of the courts in such insurance cases, see the opinion of MILLER, J., who announced the decision of the court in the

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case of *The Insurance Company v. Wilkinson*, 13 Wall. 222, 234, 236.

The foregoing disposes of the case, and the question raised as to the measure of damages need not be considered.

Judgment affirmed.

NOTE.—See INDEX, title “Rules and Regulations.”

See note, vol. 8, p. 680.

The following Georgia telegraph cases, in addition to the two foregoing, were decided during the period covered by this volume: The Georgia telegraph statute may be found in the “General Note” at the end of this volume.

Horn v. W. U. Tel. Co., Supreme Court, Feb. 19, 1892 (88 Ga. 538).
(Head-note by the court):

By the act of October 22, 1887, telegraph companies are subject to the penalty prescribed for not transmitting dispatches with due diligence, whether the persons to whom they are addressed reside within one mile of the telegraphic station, or within the city or town in which such station is located, or not. The proviso in the second section of the act relates to the duty of delivery, and not to the duty of transmission.

Langley v. W. U. Tel. Co., Supreme Court, March 31, 1892 (88 Ga. 777).
(Head-note by the court):

The act of October 22, 1887, “to prescribe the duty of electric telegraph companies as to receiving and transmitting dispatches, to prescribe penalties for violations thereof, and for other purposes,” being penal in its nature, must be strictly construed. Accordingly, the sendee of a message is not, under this act, entitled to recover the penalty therein named for a failure by the company to deliver such message with due diligence, unless the charges thereon were prepaid or tendered by the sender, or unless there was failure to deliver, or delay in delivering, on or after payment or tender by the sendee or his agent.

Greenberg v. W. U. Tel. Co., Supreme Court, Aug. 1, 1892 (89 Ga. 754).
Allegations of pleading held insufficient in an action to recover the statutory penalty for failure to deliver a telegram and to recover damages by reason of such failure.

W. U. Tel. Co. v. Lindley, Supreme Court, Aug. 1, 1892 (89 Ga. 464).
Question of admission of evidence only.

W. U. Tel. Co. v. James, Supreme Court, Aug. 27, 1892 (90 Ga. 254).
The act of 1887, requiring telegraph companies, under penalty, to deliver messages within a reasonable time after receiving them for transmission, does not, even if the message were sent from another State from that in which it is to be delivered, violate the interstate commerce clause of the Federal Constitution.

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Though the condition in a telegraph blank limiting the time within which to present claims does not apply in an action for the statutory penalty, but does as to claims for special damages, it operates against the addressee as well as the sender, if the message related to the business of both parties, and was presented for transmission in reply to one from the addressee.

W. U. Tel. Co. v. Cloud H. Hutcheson, Supreme Court, Nov. 10, 1893 (91 Ga. 353).

Under Code, § 4579, which forbids pursuit of any business or work on Sunday except works of necessity or charity, a telegraph company cannot bind itself to transmit and deliver messages on that day, except those which come within such exception; and for failure to perform such a contract does not become liable to the statutory penalty.

A message from a son to his mother, announcing that a friend will arrive on a particular train, is not a work of necessity or charity.

Willingham v. W. U. Tel. Co., Supreme Court, March 27, 1893 (91 Ga. 449).

A complaint in an action based on failure to transmit and deliver a telegram on Sunday, the message not showing that it related to a work of necessity or charity, which would warrant its being sent on that day, and the complaint containing no allegation that it did or that the operator was informed that it did, is demurrable as showing no cause of action.

Hollis v. W. U. Tel. Co., Supreme Court, July 24, 1893 (91 Ga. 801).
(Extract from head-note by the court):

The measure of damages against a telegraph company for deviating from the terms of a message correctly reporting the state of the market for a particular article, which the receiver of the message is induced by it to send forward for sale, is the difference between the actual state of the market and the terms of the message, as erroneously transmitted, overstating it, provided the plaintiff's actual loss amounts to that much.

W. U. Tel. Co. v. Timmons, Supreme Court, Oct., 1893 (93 Ga. 345).

Questions as to construction of the telegraph statute, one section of which imposes a penalty for failure to deliver telegrams with due diligence, and another section provides that the company must deliver messages where the residence of the addressee is within the city or town where the terminal office is situated or within one mile of said office.

The addressee being a non-resident, held that he did not make himself a resident within the meaning of said statute, by giving the company a temporary address.

[The statute in question was amended in 1892, so as to require the sender of a dispatch to specify at what place within the delivery limits of the terminal office a message to a non-resident shall be delivered.]

W. U. Tel. Co. v. Mansfield, Supreme Court, Oct., 1893 (93 Ga. 349).

The fact that the addressee did not reside within the city or within one mile of the terminal office, will not exempt the company from the statu-

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tory penalty for failure to deliver to the addressee when he called for the message at the terminal office.

W. U. Tel. Co. v. Moss, Supreme Court, Oct., 1893 (93 Ga. 494).

The return of the money paid for sending a telegram will not exempt the company from a penalty already incurred.

The operator having substituted a dead-head message in his own name instead of that which he had been paid for sending, the company is liable, in absence of ratification by the sender, as for total failure to transmit and deliver.

W. U. Tel. Co. v. Patrick, Supreme Court, Oct. 24, 1893 (92 Ga. 607).

A telegraph company cannot be charged with the statutory penalty in failing to deliver a telegram addressed to the wrong street and number in a city, the company having promptly taken the message to the number given, and it not appearing that it knew the proper address or could have readily ascertained it.

W. U. Tel. Co. v. Rountree, Supreme Court, Oct. 30, 1893 (92 Ga. 611).

The statutory penalty cannot be imposed for a mere verbal inaccuracy in the surname of the sender.

W. U. Tel. Co. v. Power, Supreme Court, Oct., 1893 (93 Ga. 543).

The statutory penalty cannot be recovered upon a "collect" message.

Conyers v. Post. Tel. Cable Co., Supreme Court, Nov. 6, 1893 (92 Ga. 619).

The penalty prescribed by statute for failure to promptly deliver messages is not limited to the telegraph company to which the message was originally delivered, but may be imposed upon a connecting company which has received the message for forwarding.

Freeman v. W. U. Tel. Co., Supreme Court, Nov. 20, 1893 (93 Ga. 230).
(Head-note by the court):

It appearing from the plaintiff's evidence, fairly construed, that before the telegram offering his son employment was sent, the son was under contract to work for another, consistently with which he could not have entered the employment of the sender of the telegram, the non-delivery of the telegram did not cause a failure by the son to obtain the employment to which it related, and there was no error in granting a non-suit.

W. U. Tel. Co. v. Bates, Supreme Court, Nov., 1893 (93 Ga. 352).

The statute imposing a penalty for delay of telegrams is not unconstitutional, as to messages from without the State, as interfering with interstate commerce.

In an action against a telegraph company to recover the statutory penalty, the message delivered from the terminal office may be introduced in evidence without producing that presented for transmission or proving its loss.

**EDWARD BIERHAUS ET AL. V. THE WESTERN UNION
TELEGRAPH COMPANY.***Indiana Appellate Court, June 20, 1893.*

(8 Ind. App. 246.)

FAILURE TO DELIVER TELEGRAM.—WHAT WILL NOT EXCUSE.—DAMAGES.

Where a telegraph message, when read in the light of well-known usage in commercial correspondence, reasonably informs the operator that the message is one of business importance, and discloses the transaction so far as it is necessary to accomplish the purpose for which it is sent, the telegraph company is liable for all direct damages from the negligent failure to transmit or deliver it, as written, within a reasonable time, unless such negligence is in some way excused.

A telegram in the language: "Have you claim against P. L. D.? Answer how much;" and this in reply, "Yes; one hundred and sixty-one dollars and fifteen cents," held to sufficiently indicate their importance to charge the company with special damages for failure to deliver promptly.

It is not relieved of such liability by the fact that the message was sent after the time for free delivery had ceased at the terminal office, provided the rule fixing such limit was unknown to sender and addressee. But if sender was agent of addressee and knew of the rule, the company cannot be held for special damages if it deliver the message promptly the next morning.

Failure to transmit a message to a place twenty miles away is not excused because of a storm and broken wires rendering it impossible to transmit it, but of which fact the sender was not informed.

Questions of substantial injury and damages considered.

Cases of this series cited in opinion: *W. U. Tel. Co. v. Hall*, vol. 2, p. 866; *W. U. Tel. Co. v. Cooper*, vol. 2, p. 795; *Daughtery v. Am. Un. Tel. Co.*, vol. 1, p. 588; *W. U. Tel. Co. v. Blanchard*, vol. 1, p. 404; *W. U. Tel. Co. v. Harris*, vol. 1, p. 839; *Tyler v. W. U. Tel. Co.*, vol. 1, p. 14; *Manville v. W. U. Tel. Co.*, vol. 1, p. 92; *Mowry v. W. U. Tel. Co.*, vol. 2, p. 679; *Pepper v. W. U. Tel. Co.*, vol. 2, p. 756; *Thompson v. W. U. Tel. Co.*, vol. 1, p. 772; *Postal Tel. Cable Co. v. Lathrop*, vol. 3, p. 630; *Hadley v. W. U. Tel. Co.*, vol. 2, p. 542; *W. U. Tel. Co. v. Sheffield*, vol. 2, p. 802; *W. U. Tel. Co. v. Cohen*, vol. 1, p. 670; *Fowler v. W. U. Tel. Co.*, vol. 3, p. 607; *W. U. Tel. Co. v. Harding*, vol. 1, p. 814; *W. U. Tel. Co. v. Broesche*, vol. 2, p. 815; *Brashears v. W. U. Tel. Co.*, vol. 3, p. 701; *W. U. Tel. Co. v. Henderson*, vol. 3, p. 570.

APPEAL by plaintiff below from judgment of Circuit Court, Knox county, awarding nominal damages only for failure to transmit a telegram. Facts stated in opinion.

W. A. Cullop and C. B. Kessinger, for appellants.

J. S. Prichett, J. T. Beasley and A. B. Williams, for appellee.

LOTZ, J.: The appellants sued the appellee to recover damages alleged to have been sustained on account of the negligence of the appellee in transmitting and delivering two telegraphic messages. Issue was joined; there was a trial by jury, and a verdict for appellants in the sum of fifty cents. The court rendered judgment in favor of appellants for fifty cents damages and fifty cents costs.

The errors assigned in this court are:

1. The overruling of the demurrer to the second paragraph of amended answer.
2. The motion for a new trial.

If the appellants, in the court below, secured a judgment for all the damages recoverable under the allegations of their complaint, then they can have no valid grievance to present to this court; for, where the ultimate judgment is right, no intervening error will avail in securing a reversal. *Morrison v. Kendall*, 6 Ind. App. 212 (33 N. E. Rep. 370); *Hamilton v. City of Shelbyville*, 6 Ind. App. 538 (33 N. E. Rep. 1007).

The first question presented for our consideration is whether or not special damages can be recovered under the allegations of the complaint. If only nominal damages, and the sum paid for the transmission of the messages, can be recovered, then appellants have no cause for complaint, for the court below meted out to them all they were entitled to recover.

The substantial allegations in that paragraph of the complaint upon which the judgment is founded are as follows:

“That the appellants were wholesale grocers and jobbers,

doing business in Vincennes, Indiana, by the name of E. Bierhaus & Sons, and did business throughout that part of the State of Indiana and the adjoining State of Illinois; that they employed traveling salesmen and clerks, who solicited business for them, and they had many customers at various places in both of said States; that on the 22nd day of July, 1890, and long prior thereto, they did business at Mt. Carmel, Illinois; that among their customers at said place was one P. L. Davis, who was indebted to them in the sum of \$161.15; that the appellee had a line of wire extending directly from Mt. Carmel to Vincennes, a distance of twenty miles, and was engaged in telegraphing for the public generally; that on said day appellants had in their employ one M. F. Hoskinson, a competent and practicing attorney at said Mt. Carmel, who was authorized by them to make collections for them; that on said day said Davis was the owner of a stock of goods and merchandise situate in said Mt. Carmel; that on said day, at about the hour of three o'clock P. M., said Hoskinson learned and ascertained that said Davis was disposing of his stock of merchandise, and converting his property into money, and preparing to leave the State of Illinois without paying his debts, and especially appellants' debt; and said Hoskinson thereupon prepared and delivered to the appellee, at its office in Mt. Carmel, directed to appellants, in their firm name, at 3.30 o'clock P. M. on said day, for transmission the following message: "Have you claim against P. L. Davis? Answer how much." That the defendant then and there accepted said message, and agreed to transmit the same; that said message was for the use and benefit of appellants; that said telegram was not delivered to appellants until the hour of 8.05 o'clock P. M. of said 22nd day of July, four hours and thirty-five minutes after the same was delivered to appellee for transmission; that as soon as appellants received said message, they at once prepared an answer thereto, and delivered the same to appellee, at its office in the city of Vincennes, addressed to said Hoskinson, and requested appellee to transmit the same

to Mt. Carmel, which said answer was as follows: "Yes, one hundred and sixty-one dollars and fifteen cents;" that appellee then and there accepted and agreed to transmit the same for and in consideration of the sum of twenty-five cents, which appellants then and there paid to appellee; that said telegram arrived at Mt. Carmel at 8.40 o'clock P. M. of said day, but was not delivered to said Hoskinson until 9 o'clock A. M. of the 23rd day of July, 1890; that before said telegram was delivered the said Davis had disposed of all his property, and converted the same into money, and left the State of Illinois, and appellants' debt could not then be collected from him; that said Hoskinson was a resident of the city of Mt. Carmel; that he was then the judge of the County Court of Wabash county, and his residence and place of business was well known, and he lived near appellee's office, and could have been easily found; that appellee well knew that Hoskinson was looking for an answer to his said message, as he went to appellee's office at 8 o'clock P. M. of said 22nd day of July, and inquired for an answer to his telegram; that immediately after said Davis sold his property he departed from the State of Illinois for parts unknown to appellants, and has ever since kept his whereabouts unknown to them; that, if said message from said Hoskinson to appellants had been promptly transmitted and delivered, appellants would have responded at once, and, if the telegram to said Hoskinson had been promptly delivered, appellants could have made and collected their debt due them from said Davis; that, on account of appellee's negligence in transmitting and delivering said messages, appellants have lost the debt due them from Davis, and they were prevented from collecting the same, and have lost said debt, together with a fee of \$20, which they became liable to pay to said Hoskinson."

Appellee contends that there is nothing in the first message to apprise it of the importance of speedy transmission; that there is nothing in either of them that acquaints it of the fact that appellants desired to institute legal proceed-

Bierhaus et al. v. Telegraph Co.

ings ; that the first message may have been no more than an idle inquiry, or that Hoskinson may have wanted the information for various purposes other than legal proceedings ; that it was not notified of the importance of either message, and that, therefore, no special damages can be recovered.

The transmission of information from one point to another by means of electrical wires is of comparatively recent origin. When persons and corporations first began to transmit such messages for hire, the courts applied to them the same rules that governed common carriers. There is little analogy between the two methods of doing business. The carrier transports the thing itself, while, in telegraphy, the information is not actually transported at all, but is conveyed by means of a continuous wire and electrical appliances. A language is spoken at one end, which an educated and skilful operator understands and interprets at the other. The tendency has been to apply old rules to new inventions and methods.

In the celebrated case of *Hadley v. Baxendale*, 9 Exch. 341, it appeared that the plaintiff, owner of a steam mill, broke a shaft, and, desiring to have another made, left the broken shaft with the defendant, a *carrier*, to take to an engineer to serve as a model for a new one. At the time of making the contract the defendant's clerk was informed that the mill was stopped, and that the plaintiff desired the broken shaft sent immediately. Its delivery was delayed, and the new shaft kept back, as a consequence. The plaintiff brought an action for a breach of the contract with the carrier, and claimed, as special damages, the loss of profits while the mill was kept idle. But, because it was not made to appear that the defendant was informed that the want of the shaft was the only thing that was keeping the mill from operating, it was held that he could not be made responsible to the extent claimed.

The reason for this rule is that, the defendant not having any knowledge of one element of the damages sought at the time he made the contract to carry the shaft, he could

not be held to have contracted with reference to such possible resultant consequences.

Until recently, American judicial authority has been generally agreed that the rule for the measure of damages here laid down governs, in all cases, for the failure to transmit and deliver telegraphic messages correctly and promptly. That is to say, the company which undertakes to transmit the message must be apprised by the sender, or by the terms of the message itself, of the probable resultant consequences flowing from the failure to transmit and deliver promptly; that unless it has knowledge of such probable consequences, it cannot be said to contract in reference thereto. *W. U. Tel. Co. v. Hall*, 124 U. S. 444; *W. U. Tel. Co. v. Cooper*, 71 Tex. 507 (10 Am. St. Rep. 772, note). Many cases might be cited in support of this rule. In some of the more recent decisions the tendency is to relax this rule, and some courts have gone so far as to entirely overthrow it.

In *Daughtery v. Am. Union Tel. Co.*, 75 Ala. 168 (51 Am. Rep. 435), it was held that the company was liable for special damages for the non-delivery of a cipher message, the meaning of which was not known or explained to the company's agent. So it has also often been held that the company is liable for all proximate damages where the message is couched in language, the meaning of which is obscure or unknown to the company's agent. The courts are inclined to adopt the principle that it is sufficient to render the company liable for actual damages if the message show upon its face that it relates to a business transaction, and that loss will probably result unless it is promptly and correctly transmitted and delivered, and that it is not necessary that the company be apprised of the loss that may result from its default. If the message show that it relates to a commercial or legal transaction of value, it is sufficient to apprise the company of its character, and for failure to use due diligence it must respond in all special, proximate damages.

The following are some of the cases where this principle

has been applied, messages as follows: "Cover two hundred September, one hundred August." *W. U. Tel. Co. v. Blanchard*, 68 Ga. 299 (45 Am. Rep. 480). "Ten cars new two whites, Aug. shipment fifty-six half." *W. U. Tel. Co. v. Harris*, 19 Ill. App. 347. "Sell one hundred Western Union. Answer price." *Tyler v. W. U. Tel. Co.*, 60 Ill. 421. "Ship hogs at once." *Manville v. W. U. Tel. Co.*, 37 Iowa, 214. "Ship cargo at 90 if you can secure freight at 10." *True v. International Tel. Co.*, 60 Me. 9. "If we have any Old Southern on hand sell same before board. Buy five Hudson at board." *Rittenhouse v. Independent Line, &c.*, 44 N. Y. 263. "Will take two cars sixteen; ship soon as convenient, via West Shore." This was in response to the following: "Pickled hams sixteens nine and a half." *Mowrey v. W. U. Tel. Co.*, 51 Hun, 126. "Buy fifty Northwestern, fifty Prairie du Chien, limit forty-five. *U. S. Tel. Co. v. Wenger*, 55 Pa. St. 262 (93 Am. Dec. 751). "Car cribs six sixty, c. a. f. prompt;" sent in reply to the following: "Quote cribs loose and strips packed." *Pepper v. Telegraph Co.*, 87 Tenn. 554. "Send bay horse to-day; Mack loads to-night." *Thompson v. W. U. Tel. Co.*, 64 Wis. 531.

In the well considered case of *Postal Tel., etc. Co. v. Lathrop*, 131 Ill. 575, after reviewing many authorities bearing on this question, the court concludes as follows: "We think the reasonable rule, and the one sustained by authority, is, that where a message, as written, read in the light of well known usage in commercial correspondence, reasonably informs the operator that the message is one of business importance, and discloses the transaction so far as it is necessary to accomplish the purpose for which it is sent, the company should be held liable for all the direct damages resulting from the negligent failure to transmit it as written, within a reasonable time, unless such negligence is in some way excused."

No court has gone further in this direction than the Supreme Court of Indiana. In the case of *Hadley v. Western Union Tel. Co.*, 115 Ind. 191, the telegram read

as follows : " Want your cattle in the morning ; meet me at pasture." The message was sent on the 14th day of October, but was not delivered until the morning of the 15th, at about the hour of seven o'clock. It seems that the cattle had been sold for future delivery, at the option of the purchaser, and the purpose of the message was to notify the seller to deliver the cattle at a certain time. It was the custom among stock dealers to take and weigh cattle at early daylight. On account of the failure to deliver the message promptly, the cattle were detained in a public highway for the space of thirty or forty minutes before they could be weighed ; and, on account of such detention and delay, they decreased in weight. It was held that the company was liable for the decrease in weight, although there was no showing that the company's agent was notified of the importance of the message, or that he had any knowledge of the sale of the cattle, or of the custom among stock dealers, or that the cattle were liable to decrease in weight by not being weighed immediately after rising in the morning. It is hard to reconcile some of the holdings with the general rules that prevail in measuring the damages in the cases of breach of contract. A person in making a contract has the right to protect himself against liability by proper stipulation, and it is manifestly unjust to compel him to respond in damages for consequences which were unknown and not even contemplated by him.

Telegraph companies, when they are incorporated, have certain extraordinary privileges granted to them by the State, and the State has the right to impose duties upon them. Accordingly, they are required to receive and transmit dispatches with impartiality, and in good faith, under a penalty for failure so to do. Elliott's Supp., section 1120. They are also made liable for special damages for failure or negligence in receiving, transmitting and delivering messages. Section 4177, R. S. 1881. Most all the States have similar enactments. It seems to us that it is more logical to say that there are duties imposed upon the company by law, and that for the

breach of these duties it is liable for all the damages that naturally and proximately result from the breach of the duty, and not from the breach of a contract.

The appellee further contends that the complaint does not show that the appellants have lost any legal remedy; that they may still pursue the said Davis by legal process or otherwise, and collect their debt. If, however, the collection of their debt has been defeated or rendered improbable by the neglect of the appellee, we think the appellants have sustained a substantial injury. In *Parks v. Alta California Tel. Co.*, 13 Cal. 423 (73 Am. Dec. 589), the plaintiffs, in reply to a message from their agent, informing them of the failure of a certain firm, and inquiring the amount due, sent the following: "Due 1,800; attach if you can find property. Will send note by to-morrow's stage." The message was delayed through the negligence of the defendant's agent, and, when it reached its destination, all the property of the firm had been attached by other creditors, and the plaintiff's claim was wholly lost. The loss of the debt was held to be the natural and proximate damages resulting from the defendant's negligence.

In *W. U. Tel. Co. v. Sheffield*, 71 Tex. 570 (10 Am. St. Rep. 790), the message read as follows: "You had better come and attend to your claim at once." The delivery of the message was delayed by the negligence of the company, so that other creditors attached and obtained first liens upon the property of the debtor. It was held that the measure of damages was the value of the debt, with interest to the date of trial, and the costs of the message. The same principle was applied to similar circumstances in *Bryant v. Am. Tel. Co.*, 1 Daly, 575. The complaint states a case which entitles the appellants to recover special damages.

The first part of the amended second paragraph of the answer is addressed to the first message, and is designed to excuse the appellee from promptly transmitting the same. The facts upon this point alleged, in brief, are that

said message was delivered to appellee's agent at Mt. Carmel at the hour of 5.10 o'clock in the afternoon of July 22, 1890, and that at said time, and for several hours just previous thereto, a severe storm was raging at Mt. Carmel, Ill., and along the route over which the wires extended between Mt. Carmel and Vincennes, and such storm continued with great violence for the period of three hours after said message had been delivered for transmission; that during all of said time the air was so charged with electricity, and the wires so affected thereby, that it was impossible to transmit such message over such wires, and said wires were thrown down and broken by trees falling upon them; that as soon as said storm abated the message was, at the earliest possible moment, transmitted and delivered.

Appellants assert that these facts do not show a sufficient justification for the delay; that no one but a skilled electrician or telegrapher can determine what storms affect the wires so that a message can not be sent over them, and that none but the agents of the company could know that the wires were broken at remote points; that when the company received the message it knew of these facts and appellants' agent did not; that when it accepted the message and money for transmission, if it failed to inform appellants of its inability to transmit at once, that its liability became fixed from that moment; that, had appellants known of the inability, they might have availed themselves of other means of communication and thus have secured their debt.

The statute, section 1122, Elliott's Supp., requires telegraph companies to receive messages. They have no option to refuse them, except upon payment of a penalty. The law does not require of them impossible or unreasonable things. If a message can not be transmitted, by reason of storms or other atmospheric influences, the company will be excused. *Western Union Tel. Co. v. Cohen*, 73 Ga. 522.

If the delay in transmitting a message is caused by conditions beyond the control of the company, it cannot be

compelled to respond in damages. *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181.

If, at the time the message is received, the company's agents have no knowledge that the wires are in such a condition that the message can not be transmitted, or if, after it is received, conditions arise which render it impossible to transmit it promptly, it will be excused. *Fowler v. Western Union Tel. Co.*, 15 Atl. Rep. 29.

But the case made by the answer does not fall within these rules. It is shown that, at the time the message was received, the company's agent knew of its inability to transmit the message promptly, by reason of the electrical storm and its broken wires. There is no showing that the appellants had knowledge of these conditions, or that the company's agent gave them any such information. It is true that appellants knew that a storm was raging, but it surely will not be contended that every storm so affects the wires that messages can not be transmitted, nor that every storm causes trees to fall over and break the wires. The law requires that the company shall deal with the public in good faith ; that each party shall be placed on an equal footing. It is manifestly unfair for the company to receive the message, knowing that its wires are broken, and that an electrical storm is raging which renders it impossible to transmit promptly, and keep such knowledge locked up from the sender. Persons resort to telegraphy because of its rapid communication, and pay exorbitant prices for the service because it is rapid. If the company knows that it can not give quick communication when the message is accepted, it can not excuse itself, except by notifying the person presenting the message of its inability. Suppose there were several lines between the same points, operated by different companies, and that one of the lines is broken and can not be repaired for several hours, and these facts are known to the company only. A message is presented and accepted and no notice of inability is given. A delay of several hours ensues and great damages are incurred. Would it be contended that the company would

not be liable, when, if it had communicated its inability, the message might have been sent by another line and the loss avoided?

So, in this case, if appellants had been informed of appellee's inability, they might have made the communication by other means. They were only half an hour away by rail or two hours by courier. We think this part of the answer insufficient.

The second part of the answer relates to the failure to deliver the second message promptly. It is averred that this message was delivered to appellee's agent at Vincennes, Ind., at 8.30 o'clock P. M. of July 22nd; that it was promptly transmitted to its office in Mt. Carmel, where it was received at 8.40 o'clock of the same day; that on said day, and for a long time prior thereto, there was a general rule and regulation in force at said office, to the effect that, if any message was received after 8 o'clock P. M. of any day, such message would not be delivered by messenger of appellee away from said office, and that such message would only be delivered on the day of its reception, unless the person to whom such message was addressed employed a special messenger to make such delivery; that such custom was general and uniform at said office and place, and was well known and understood by the citizens and inhabitants of said Mt. Carmel and vicinity; that when the said M. F. Hoskinson, mentioned in the complaint, delivered the first message referred to in the complaint, he was fully informed as to said rule and regulation, and was then notified by appellee's agent that if an answer should be received to the message after the hour of 8 o'clock P. M. of said day, the same would not be delivered away from the receiving office until the following day, unless a special messenger was employed to make such delivery; that no such messenger was employed, and that appellee delivered the same promptly on the next day. Appellants contend that these facts do not excuse the appellee for the negligence imputed to it for a failure to deliver the second message, because it is not shown that when they sent the

message from Vincennes they had knowledge of or were informed of the regulations at Mt. Carmel. It is well settled that a telegraph company may reasonably regulate its office hours and its free delivery limits, according to the requirements of the business at the various points where it holds itself out for public service. It is not the regulation that is complained of here, but the failure of the company to notify appellants of the existence of such regulation.

In *Western Union Tel. Co. v. Harding*, 103 Ind. 505, which was an action to recover a statutory penalty, it was held that a telegraph company is not required to keep its agents informed concerning the office hours at all other points so that when a message is presented for transmission the sender may be apprised of any probable delay which may intervene at the other end of the line. This decision, however, was not unanimous, and it was expressly limited to cases for the recovery of a penalty. The intimation, however, is that, in a case to recover special damages, such regulation, without being communicated to the sender, would not exculpate the company from liability. MITCHELL, J., said: "It might well be that in a case where a message was delivered, which showed upon its face the importance of speedy transmission, and other means of making the communication were available to the sender, which might be resorted to if he were informed that the one chosen was ineffectual, or his conduct might otherwise be materially controlled thereby, the company would be bound, at its peril, to ascertain and disclose its inability to serve him, or render itself liable to respond in damages."

In *W. U. Tel. Co. v. Broesche*, 72 Tex. 654, it was decided that a telegraph company could not relieve itself from liability for failing to deliver a message paid for and sent by it by showing that its office at the point of delivery was closed when the message was received for transmission. A telegraph company had an office regulation at Hannibal, Mo., which confined the free delivery of messages in that city to within a radius of ten blocks. "It would, in our opinion, be quite unreasonable to expect the

plaintiff to be advised of such a regulation. It would be much more reasonable to require the defendant's agent to notify the sender of a message of the free delivery limits applicable only to the place of destination.' *Brashears v. W. U. Tel. Co.*, 45 Mo. App. 433. There are authorities which take a contrary view of this question. *W. U. Tel. Co. v. Henderson*, 89 Ala. 510; *Stevenson v. Montreal Tel. Co.*, 16 U. C. Q. B. 530; *Given v. W. U. Tel. Co.*, 24 Fed. Rep. 119.

In the case last cited, Mr. Justice MILLER said: "Nor do we see that it is the duty of the Western Union Telegraph Company to keep the employes of every one of its offices in the United States informed of the time when every other office closes for the night. The immense number of these offices all over the United States, the frequent changes among them as to the time of closing, and the prodigious volume of a written book on this subject, seem to make this onerous and inconvenient to a degree which forbids it to be treated as a duty to its customers, for neglect of which it must be held liable for damages." We do not concur in the statement that onerous and burdensome conditions would be imposed upon the company if it were required to inform its customers of the office hours and delivery limits at the delivery office. It is a well-known fact that such companies have rate books, with the names of the stations alphabetically arranged, which its employes frequently resort to before they accept a message. By a proper designation, the office hours and delivery limits of each station could be readily indicated. Such methods are applied in the postal services.

Mr. Thompson, in his work on Electricity, section 300, says: "But it is a mere judicial assumption to say, as was said in one case (*Given v. Western Union Tel. Co.*, *supra*), that the employes in a telegraph office are not required to know the hour at which an office of the company in another city closes. On the contrary, it is an obvious suggestion that, in any properly regulated telegraph system, the offices

would be classified and there would be a uniform time for the closing of those of each class, of which time every agent receiving dispatches would be apprised. It is probable that there is not a receiving agent in the postal telegraph service of France or Germany that does not know the hour of closing of every office in the republic or empire."

The averment here, however, is that the appellee informed appellants' agent at Mt. Carmel, before the second message was sent, of the existence of such regulation. As he was specially entrusted with the management of the business at that end of the line, his knowledge must be deemed the knowledge of his principals. *Brannon v. May*, 42 Ind. 92; *Phoenix Mut. Life Ins. Co. v. Hinesley*, 75 Ind. 1.

That part of the answer that is addressed to the failure to promptly transmit and deliver the first telegram is insufficient, and that part that is addressed to the failure to promptly deliver the second telegram is sufficient; but as the pleading attempts to answer the whole complaint, the demurrer should have been sustained.

[The remainder of the opinion related to the admissibility of evidence of statute law of another State, which had not been pleaded.]

Judgment reversed, with instructions to sustain the motion for a new trial and the demurrer to the amended second paragraph of answer, and for further proceedings in accordance with this opinion.

Motion for rehearing overruled, November 23, 1893.

NOTE.—See note to next case.

**THE WESTERN UNION TELEGRAPH COMPANY V. EDWARD
BIERHAUS ET AL.**

Indiana Appellate Court, Jan. 9, 1894.

(8 Ind. App. 563.)

**INDIANA TELEGRAPH STATUTE.—DISCLOSING CONTENTS.—STATUTE
CONSTRUED.**

The penalty imposed by statute for failure to transmit and deliver telegrams with impartiality and good faith and without discrimination, cannot be imposed for wilful disclosure by employees of the company of the contents of a telegram.

Cases of this series cited in opinion: *W. U. Tel. Co. v. Pendleton*, vol. 1, p. 632; *W. U. Tel. Co. v. Mossler*, vol. 1, p. 645; *W. U. Tel. Co. v. Harding*, vol. 1, p. 814; *W. U. Tel. Co. v. Kinney*, vol. 2, p. 504; *W. U. Tel. Co. v. Steele*, vol. 2, p. 538; *W. U. Tel. Co. v. Wilson*, vol. 2, p. 519; *W. U. Tel. Co. v. Brown*, vol. 2, p. 508; *W. U. Tel. Co. v. Swain*, vol. 2, p. 539; *Hadley v. W. U. Tel. Co.*, vol. 2, p. 582; *W. U. Tel. Co. v. Axtell*, vol. 1, p. 295.

APPEAL by defendant below from judgment of Circuit Court, Daviess county. Facts stated in opinion

J. T. Beasley and *A. B. Williams*, for appellant.

W. R. Gardiner, *C. G. Gardiner* and *J. W. Ogden*, for appellees.

REINHARD, J.: The appellees brought this action to recover from the appellant the penalty imposed by the act of April 8, 1885, the breach alleged being the disclosure of several telegraphic dispatches.

A separate demurrer, addressed to each paragraph of the complaint, was overruled. There was a trial, and a finding and judgment in favor of appellees. But two questions

are presented by the appeal, and they arise from the ruling upon the demurrer. They are these :

1. Can the statutory penalty of one hundred dollars be recovered on account of the wilful disclosure of the contents of a telegraphic dispatch by the company through its agents or employees ?

2. Can an action to recover such penalty be maintained in any county other than the one from which the dispatch was sent, and in which the contract was entered into ?

The statute upon which this suit is sought to be maintained, and indicated by its title, was designed to enjoin certain duties upon telegraph and telephone companies, and to provide penalties for the violation of the same. Section 1 of the act provides, amongst other things, that the company shall, upon the usual terms, transmit any message received for that purpose

With impartiality and good faith, and in the order of time in which they are received, and shall in no manner discriminate in rates charged, or words or figures charged for, or manner or conditions of service between any of its patrons, but shall serve individuals, corporations and other telegraphic companies with impartiality.

Section 2 defines the duties of telephone companies.

Section 3 provides a penalty of one hundred dollars for each offense in violating any of the provisions of the foregoing sections, to be recovered by the party aggrieved in a civil action in any court of competent jurisdiction. R. S. 1894, sections 5511-5513.

This statute, by amendment, has taken the place of the act of May 6, 1853, which, upon the subject of our investigation, was similar, in its provisions, to the present statute. See R. S. 1881, section 4176.

It will be seen at a glance that there is no provision in the enactment under consideration prohibiting telegraph companies, in express terms, from divulging the contents of a telegraphic message. The question is, is such provision contained in the act by fair implication, or in other words, can it be said to be fairly within the meaning of the

act? The question here presented has never been decided in our State, nor, so far as we have been able to discover, in the courts of any of our sister States. It is, therefore, with us at least, a question of first impression, but this will not lessen the duty of giving it a most careful consideration.

At first blush, the candid mind will naturally be impressed with the justness of an interpretation which would, without a glaring violation of legal principles, result in visiting a penalty upon any company that suffers its employes to divulge the contents of a message intended for none but the scrutiny of the addressee. It is true that we have a criminal statute making it an offense for any such employe to reveal the contents of any telegraphic dispatch, and providing a punishment for the same (R. S. 1894, section 2248), but public policy would perhaps dictate that the law should go a step further, and hold a rein over the companies themselves, so that every inducement would incline them not to retain in their service those who would thus betray a trust of so sacred a character. But it is not the office of a court, in construing a statute, to inject into it, by forced interpretation, matters which, according to the notions of the judge, should have been, but were not, placed there by the framers, however much such matters might conduce to the public interest, for, if there is a want of proper legislation upon such subject, it is for the law making power, and not for the courts, to supply the remedy.

There are certain well defined, and in fact elementary, rules of interpretation, to which the courts are bound to adhere in giving construction to a statute.

The act under consideration, as has been repeatedly decided, does not award liquidated damages for failing to perform a duty, but gives a penalty to a private individual, and being, therefore, highly penal in its character, must be strictly construed. Hence, if the act complained of is not clearly within the scope of prohibition contained in the statute, the latter must receive at construction such as will not involve penal consequences. *Western Union*

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Tel. Co. v. Pendleton, 95 Ind. 12; *Western Union Tel. Co. v. Mossler*, 95 Mo. 29; *Western Union Tel. Co. v. Harding*, 103 Ind. 505; *Western Union Tel. Co. v. Kinney*, 106 Ind. 468; *Western Union Tel. Co. v. Steele*, 108 Ind. 163; *Western Union Tel. Co. v. Wilson*, 108 Ind. 308; *Western Union Tel. Co. v. Brown*, 108 Ind. 538; *Western Union Tel. Co. v. Swain*, 109 Ind. 405; *Hadley v. Western Union Tel. Co.*, 115 Ind. 191.

The statute must be "at once strictly construed and pursued." Thompson Law of Electricity, section 450. One of the first ends to be accomplished in finding the meaning of the statute is to ascertain its object and design.

As was said by ZOLLARS, J., in *Western Union Tel. Co. v. Wilson*, *supra*: "In construing statutes, the prime object is to ascertain and carry out the purpose of the Legislature in its enactment, and, while it is the duty of the court to yield to the words of the statute, still, in determining what meaning it was intended to have, it is proper to consider its spirit, the object it was intended to subserve, and the evils it was intended to remedy. Without doing violence to the language of the statute, the words used will be so construed as to bring the operation of the act within the intention of the Legislature."

Telegraph companies are *quasi* public corporations, and are, under the general duty they owe to the public, required to transmit and deliver any messages given to them for that purpose, on the payment or tender of the usual charges, with reasonable diligence, and in the order of time in which such messages were delivered.

While these obligations rest upon such companies by virtue of their *quasi* public character, and, perhaps, as common law obligations, yet, in order to set this question at rest, many, if not all, the States of the Union have passed appropriate statutes requiring such companies, under penalties, to receive messages, and on payment of the usual charges, to transmit them faithfully, without unreasonable delay, and in the order in which they are received, and without making unjust discriminations

between patrons. Thompson Law of Electricity, section 157 *et seq.*

Besides the statutes already referred to, the Legislature of this State also passed an act prohibiting, in express terms, the disclosure of telegraphic messages, and giving a remedy in damages to the party injured, to the extent of such injury, and making such company liable for failure or negligence in the performance of their duties generally. R. S., 1894, section 5513.

It is not claimed by the learned counsel for appellees, that the civil and criminal statutes, other than the one under immediate consideration, do not furnish full and adequate remedies to the patrons of telegraph companies, in the transaction of their business, nor do we think such a position would be tenable. The criminal statute fully punishes the wrongdoer, while the civil remedy gives ample redress for the consequences resulting from unlawful disclosure. In addition to these the penal statute in hand makes the wrongful acts of the servants of these corporations, such as partiality, discrimination, and bad faith in the transmission of messages, a tort for which the company is bound to respond in the penalty prescribed.

To our minds, it is clear that this penalty was intended to punish such wrongful acts only as were not covered by the criminal statutes. Any other construction would impute to the law-making power an intention to assess a double punishment for the same offense. The law, as interpreted in this State, abhors the infliction of double penalties. It is for this reason that the courts will refuse to adjudge punitive damages when the criminal law provides a punishment against the wrongdoer. It is true, the criminal statute here does not operate directly against the corporation, but the act constituting the malfeasance is, nevertheless, punished. Corporations are but fictitious persons, and all their acts and omissions are only the real acts or omissions of their agents. Some of the authorities go so far as to hold that punitive damages are allowed

against corporations, if at all, only in extreme cases. 5 Am. and Eng. Encyc. of Law, 23.

Our own courts hold, however, that punitive damages may be recovered against a corporation for the wrongful acts of its servants, where such damages might be recovered against the servant. *Jeffersonville R. R. Co. v. Rogers*, 28 Ind. 1; *Jeffersonville R. R. Co. v. Rogers*, 38 Ind. 116; *Citizens' St. R. R. Co. v. Willoeby*, 134 Ind. 563 (33 N. E. Rep. 627).

We do not undertake to declare that a penal law in the nature of the one under construction would be invalid if there already existed a criminal statute against the same act, as that question is not before us. But we do give it as our conviction that when one statute declares a given act to constitute a criminal offense, and prescribes a punishment therefor, a second enactment, in the nature of a penal or *qui tam* statute, should not be so construed as to bring the act constituting the crime or offense within the purview thereof, unless by express terms it is so provided. Here, in our view, both the letter and the spirit is against the interpretation contended for, and it is the duty of the court to avoid the penalty by construction, rather than to create it. *Western Union Tel. Co. v. Axtell*, 69 Ind. 199; *Western Union Tel. Co. v. Mossler*, *supra*; *Western Union Tel. Co. v. Harding*, *supra*.

While, as has been stated, the Supreme Court has never passed upon the exact question here in dispute, some of its rulings in recent cases are indicative of what it considered as the acts denounced by this statute, and for which the penalty is awarded. Thus it was declared that failure or delay in the transmission of messages was the only thing provided against by the law of 1853, and that the act of 1885 added to these the element of discrimination in rates charged or manner or condition of service. *Western Union Tel. Co. v. Brown*, *supra*; *Hadley v. Western Union Tel. Co.*, *supra*.

It is true that in some of the cases it is said that the statute in question denounces three distinct acts, viz.: Bad

faith, partiality and discrimination. *Western Union Tel. Co. v. Steele, supra*; *Western Union Tel. Co. v. Swain, supra*.

But these acts can have reference only to the duty of transmission, as they are inseparably connected with the same by the language of the law itself. To divulge the contents of a message has no necessary connection with its transmission. It may be transmitted ever so faithfully and impartially, and yet its import may be disclosed, either before or after the transmission, or during the progress thereof. Our opinion is that transmission in good faith and with impartiality means the forwarding of the message, and the delivery thereof, accurately, and without favor or preference.

There is another feature in this case not unworthy of consideration. The complaint avers that the messages transmitted were of a private business nature, and some weight is sought to be given this fact in the brief of appellees' counsel. But the statute makes no discrimination between private dispatches and those of any other character, except that messages of public and general interest, and those to and from officers of justice, have preference over private dispatches.

If the appellees can recover the penalty in this action, what is there to hinder the sender of any dispatch, whatever its nature, from recovering it? Or will it be claimed that "bad faith" can be ascribed only to the disclosure of private messages?

The statute giving a remedy in special damages (section 5513, R. S. 1894) expressly confines it to cases in which the disclosure is that of a private dispatch, but not so with the act of 1885. It makes no such discrimination. It requires as much "good faith" in the transmission of a public or non-secret message as in a private one. Can it be true that the Legislature intended to impose this penalty on telegraph companies for every disclosure by its servants? If so, we shall never see the end of the litigation to spring from it. And yet, not a case is to be found on record where

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the penalty has been claimed for any divulgence.

Without further extending this opinion, we give it as our conclusion that the action will not lie.

We think the demurrer should have been sustained.

As this disposes of the entire case, it will not be necessary for us to pass upon the question of jurisdiction of the trial court.

Judgment reversed.

NOTE.—For earlier Indiana telegraph cases, see vol. 3, p. 656, note.

The following are memoranda of other cases decided in the Appellate Court of Indiana :

W. U. Tel. Co. v. Stratemeier, Dec. 29, 1892 (32 N. E. 871).

The stipulation in telegraph blanks requiring written notice of claim to be made within sixty days is waived where an oral claim is presented and the company corresponded with the plaintiff and made an offer of settlement within the sixty days.

The sender of a telegram having been informed by the agent of the company that it had a line to an office at the point of destination, the company is estopped from asserting that it had no such line and office, for the purpose of availing itself of the stipulation in the blank that in respect to connecting companies the first company is the agent of the sender.

Mental distress to the sender is a proper element of damages, but not his distress arising from sympathy with the sorrow of others.

Western Union Telegraph Company v. Belle Eskridge, Jan. 31, 1893 (7 Ind. App. 208).

In an action for damages for delay of a telegram announcing serious illness of a relative, a complaint alleging that defendant's negligence prevented plaintiff from seeing her mother before she died, which she could have done if the message had been promptly delivered, is sufficient to indicate her intention, without the direct allegation that if she had received the message she would have gone.

Contracts made on Sunday are not void, but only voidable ; therefore, advantage of the fact that they are so made can be taken by answer only, not by demurrer. Principle applied to case where telegram was proffered for transmission on Sunday.

A telegram in the language, "Mrs. Minks is bad sick ; recovery doubtful," sufficiently indicates the importance of its prompt transmission and delivery, and the necessity which would make valid the contract for its transmission though made on Sunday ; though it did not indicate the relationship between the addressee, plaintiff, and the person whose illness was announced.

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W. U. Tel. Co. v. Newhouse, March 30, 1893 (6 App. 422).

A telegram showing on its face that it was important was addressed to plaintiff at "Vandalia Freight Yards, Terre Haute, Ind." Held, in the absence of proof that this was a public place where telegrams to persons having business with the railroad company were usually received, and it being proven that the company was informed that no such person was employed or known at that place, that instead of leaving the message with the yard master further effort should have been made to find the addressee, and it appearing that inquiry at the post-office or reference to the city directory would have enabled the company to find him, its failure to make such inquiry was negligence.

For mental anguish, without other pecuniary loss than the cost of the message, recovery may be had against a telegraph company for failure to transmit; and \$400, held not excessive damages where the result of the default was the failure of the addressee to visit his dying mother.

W. U. Tel. Co. v. Olms, Nov. 23, 1893 (8 App. 364).

Recovery may be had against a telegraph company for mental anguish due to failure to deliver a message.

Questions of evidence.

Peterson v. W. U. Tel. Co., June 5, 1894 (37 N. E. 810).

Statutory penalty cannot be recovered for failure to deliver a message, inadvertently received, to a place where the company had no office.

C. C. HERRON v. WESTERN UNION TELEGRAPH COMPANY.

Iowa Supreme Court, Jan. 31, 1894.

(37 N. W. Rep. 896.)

DELAY OF TELEGRAM.—IOWA STATUTE.—RIGHT OF ADDRESSEE.—LIMITING TIME.—DAMAGES.

Attempts to deliver telegram held insufficient to absolve company from charge of negligence.

Code §§ 1328 and 1329, concerning the liability of telegraph companies for delay or default in transmission and delivery, makes the company in fault liable to the addressee, though there be no contractual relations between them.

Knowledge by operator of the contents and purpose of a telegram, held to charge the company with notice of its importance.

Herron v. Telegraph Co.

Measure of damages, in case opportunity to sell a horse which had no fixed market value is the result of delay of a telegram, is difference between lost offer and price actually obtained by reasonable effort, together with cost of keeping and interest.

Stipulation limiting time in which to present claim for damages for failure to deliver telegram promptly, does not apply where amount or fact of loss not ascertainable until after expiration of specified time.

Cases of this series cited in opinion: *W. U. Tel. Co. v. Du Bois*, vol. 2, p. 499; *Wadsworth v. W. U. Tel. Co.*, vol. 2, p. 786; *W. U. Tel. Co. v. Adams*, vol. 3, p. 768.

APPEAL by defendant below from judgment of District Court, Lee county. Facts stated in opinion.

Cummins & Wright, for appellant.


Casey & Stewart, for appellee.

ROBINSON, J.: On the 31st day of March, 1890, the plaintiff was the owner of a stallion named "Mark," which was in the custody of his brother George Herron, at Warren, in Lee county. The plaintiff was in the town of Clarksville, in Butler county, where he was engaged with one Wintrode in selling a fence machine. On that date one George Cassidy went to the place where the horse was kept, and made an offer for him to a brother of plaintiff, named B. B. Herron, and requested that he telegraph the offer to the plaintiff. Accordingly B. B. Herron went to the office of the defendant in Warren, and left to be sent to plaintiff a night message, which read as follows:

"WARREN, March 31, 1890.

"To C. C. Herron, Clarksville, Iowa: Have traded with George Cassidy for Mark, three horses, 1, 2, 3, two hundred balance, fifty dollars young cattle.
B. B. HERRON."

There was evidence which tended to show that the offer of Cassidy was to be considered withdrawn on Wednesday, April 2d, if not accepted on or before that day; that B. B. Herron had no authority to accept the offer or sell the horse; that he sent the message as the agent of Cassidy; and that



the agent of defendant at Warren knew that it related to a trade, and that an answer was expected the next day. The dispatch was received by the agent of defendant at Clarksville before 9 o'clock in the morning of April 1st, and was at once given to a messenger to deliver. After an absence of several hours he returned it with the statement that he could not find the person to whom it was addressed. The agent then sent a service message to the office at Warren, stating that plaintiff was unknown in Clarksville, and asking for a better address. At noon of Wednesday he received an answer stating that plaintiff was a patent fence man, and would be found in town. At about the time that dispatch reached the agent at Clarksville, the plaintiff received a letter from B. B. Herron, telling of the trade, and asking why the dispatch had not been answered. The plaintiff then went to the office, and sent a dispatch to his brother to do the best he could with Cassidy. While he was there the dispatch of his brother was delivered to him. His dispatch was not delivered to his brother until Wednesday evening, and Cassidy was not seen until the next day, when he refused to take the horse. The plaintiff returned to Lee county in July, and took the horse to Nebraska, where he sold him for \$50. He seeks to recover in this action the damages he claims to have sustained in consequence of the failure of defendant to deliver the message in time for him to accept the offer of Cassidy. The judgment was rendered for \$177.65, the amount of the verdict, with interest and costs.

1. The appellant contends that the verdict was not authorized by the evidence, and insists that it exercised due diligence to deliver the message. We think there was sufficient evidence to support a verdict for the plaintiff. Clarksville is shown by the record to have been a town of about 600 people in April, 1890. The plaintiff, with his wife and Wintrode, went to Clarksville on the 25th day of March, 1890, and stopped at the only hotel in the town, where he registered. A sample of the fence which the machine he was selling made was set up near to the principal business street,

one block from the hotel, from which it could be seen. He and his companion were then engaged in exhibiting the fence to the public, and in trying to sell the machine, within the free delivery limits of the Clarksville office, during the last day of March and the first two days of April. Belden, the messenger of defendant, had lived in the town 25 years, was running a bus line, carried the mails and express, and was well acquainted with its people. There is some conflict in the evidence in regard to the effort he made to deliver the message. He claims to have inquired of the landlord of the hotel where plaintiff stopped, at the restaurant, at one of the railway depots, and of a passenger on a train, without obtaining any information in regard to plaintiff. There is evidence, however, which tends to show that the landlord, in answer to his question, told him to look at the hotel register; that he did so, but looked only at the names under the latest date; that he had seen the plaintiff several times; that when he inquired at the restaurant he said plaintiff "belonged to the fence gang," and was told that he was at the hotel; and that he delivered a dispatch to Wintrobe on the 1st day of April, in the presence of plaintiff. It is evident that if the messenger had used ordinary diligence in his search he would have found the plaintiff and his negligence is that of the defendant.

The sending of the service message did not relieve it of responsibility, for the reason that the address of the plaintiff as given in the dispatch to him was all that was necessary to enable the defendant to find him readily. It is said that B. B. Herron knew that the defendant had not found his brother, and could have given the required information, so that his brother would have been found, and a message accepting Cassidy's offer received, in sufficient time to have effected the sale, but that he negligently withheld the information. If that be conceded to be true, it does not follow that his negligence was that of the plaintiff, for the reason that he appears to have been the agent of Cassidy for the purpose of sending the dispatch.

2. It is said that if the dispatch was sent by B. B. Her-

ron as the agent of Cassidy, then, so far as it related to plaintiff, the act in sending it was purely voluntary, and conferred upon him no right of action on account of negligence in sending it. The Code provides as follows:

§ 1328. Any person employed in transmitting messages by telegraph must do so without unreasonable delay, and anyone who wilfully fails thus to transmit them, or who intentionally transmits a message erroneously, or makes known the contents of any message sent or received to any person except him to whom it is addressed, or to his agent or attorney, is guilty of a misdemeanor. § 1329. The proprietor of a telegraph is liable for all mistakes in transmitting messages made by any person in his employment, and for all damages resulting from a failure to perform any other duties required by law.

The defendant violated the provisions of section 1328, in not transmitting the message to plaintiff without unreasonable delay, and thereby became liable, under section 1329, for all damages which resulted from that failure. There were no contractual relations between it and the plaintiff, and some authorities hold that in such cases the person injured cannot recover; but the rule which seems to prevail most generally in this country is to allow the person to whom a dispatch is sent, even though sent by a person under no obligation to send it, to recover of the telegraph company damages caused by delay in the transmission. *Telegraph Co. v. Du Bois* (Ill. Sup.) 21 N. E. 5; 3 Suth. Dam. 314; 2 Shear. & R. Neg., § 543; Whart. Neg., § 757; Gray Com. Tel., § 65; *Wadsworth v. Tel. Co.*, 86 Tenn. 711 (8 S. W. 574); *Telegraph Co. v. Adams* (Tex. Sup.), 12 S. W. 857. There can be no doubt, under these authorities and the section of the Code quoted, that the right of plaintiff to recover does not depend upon a contract made by or for him.

3. The court charged the jury that, if plaintiff was entitled to recover, the measure of damages would be the difference between the price he would have received from Cassidy and the price he afterwards obtained for the horse, and the reasonable value of the care and keeping of the horse, with 6 per cent. interest from the time the horse was

sold. The appellant contends that the measure of damages given by the charge is erroneous. The blank on which the message sent was written stated that errors and delays might be prevented by repetition, for which an extra price would be charged, but that defendant would receive night messages to be sent without repetition, at a reduced rate,

And upon the express condition that the sender will agree that he will not claim damages for errors or delays, or for non-delivery of such message, happening from any cause, beyond a sum equal to ten times the amount paid for transmission.

We do not understand the appellant to claim that the plaintiff is bound by the provisions quoted, but it contends that it had no knowledge of the transaction out of which the message grew; that the message did not disclose the interests which were dependent upon it; and that defendant should not be charged with any liability which it can not be reasonably said would be an ordinary and natural result of a failure to transmit the message within a reasonable time, and therefore contemplated by the parties when the defendant undertook to send the message. The evidence shows that the agent of defendant at Warren knew of the horse when the message was given him to send, that it related to a pending trade, and that an answer was expected. Knowledge of these facts was sufficient to authorize the jury to find that defendant should be charged with knowledge of the importance of the message when it was received. *Garrett v. Telegraph Co.*, 83 Iowa, 262 (49 N. W. 88.)

It is claimed that, if defendant is liable to plaintiff for all the damages he sustained by reason of the delay in transmitting the message, the measure of that damage is the difference between the market value of the horse and the price which Cassidy would have paid for him had his offer been accepted. That would probably have been true had there been a market value for the horse, but the evidence shows that there was not. He was an inferior animal, and valuable only for breeding purposes. There was

no market for that kind of horse in Lee county and vicinity. George Herron, who had charge of the one in question, made diligent effort to sell him after the 31st day of March until he was taken to Nebraska, but without success. The plaintiff also personally made every effort possible to effect a sale, and finally took the horse to Nebraska, and traded him for land, receiving for him \$50 in value. It is not true, as a general rule of law, in such cases as this, that the plaintiff would be entitled to recover the difference between the price he would have received had he been able to accept the offer and the price he actually received, but it appears that the plaintiff in fact sold the horse for all which could have been realized for him with reasonable effort to secure the best price obtainable. The value of the property Cassidy offered for the horse was \$250; hence plaintiff sold him for \$200 less than the amount of Cassidy's offer. It was necessary for the plaintiff to pay the expense of keeping the horse from the 2nd day of April until he was sold, and the evidence sustains the allowance, if any, made by the jury for that purpose. The loss in price, and the expense of keeping the horse, with interest, represented actual damages which the plaintiff sustained by not accepting the offer of Cassidy; and it is the policy of the law to permit a person injured by the wrong of another to recover the amount of his loss. Where the loss results from the failure to sell the property for which there is no market value, its actual value may be ascertained by means of the best evidence of which the case admits. 3 Suth. Dam. 476; 1 Sedg. Dam. § 250; Wood, Mayne, Dam. § 22; *White v. Cattle Co.* (Tex. Sup.) 12 S. W. 867. We conclude that the measure of damages adopted by the court as applied to the facts in this case was not erroneous. The jury were authorized to find that Cassidy would have taken the horse according to his offer had it been accepted, and the verdict is sustained by the evidence.

4. The blank on which the message was written by B. B. Herron contained the following provision:

No claim for damages shall be valid unless presented in writing within thirty days after sending the message.

The court charged the jury as follows: "If you find from the evidence that the sender of the message was the agent of and acting for the plaintiff in transmitting the message, then it would be binding upon him, unless the plaintiff has shown by evidence that the claim he makes for damages against defendant had not matured, if so, and could not reasonably have been ascertained within thirty days after the message had been sent, if such was the case." We think that portion of the charge is substantially correct, as applied to the facts in this case. The evidence authorized the jury to find that the plaintiff did not know, and could not with reasonable diligence have ascertained within thirty days of the sending of the message, what amount of damage, if any, he had sustained in consequence of defendant's negligence. The blank required that claims for damages, not notice of claim, to be valid, must be presented within the time stated. A limitation in the agreement for sending the message, which in its practical effect would deprive the sender of the message of all redress for injury caused by the wrong of the defendant, would be unreasonable, and to that extent, at least, must be deemed inoperative.

5. The conclusions announced dispose of all material questions presented for our determination. We find no sufficient ground for disturbing the judgment of the District Court, and it is therefore affirmed.

NOTE.—For earlier Iowa telegraph cases, see vol. 3, p. 664, note.

See INDEX, titles "Limiting time," "Receiver or addressee," "Damages."

KENTUCKY.—*W. U. Tel. Co. v. Daniels*, Superior Court, March 14, 1894 (Abstract in 15 Ky. L. R. 813).

In case of a telegram addressed to a person beyond the delivery limit, the only duty of the operator at the terminal station is to use ordinary diligence to ascertain if the addressee is in town, and if he is, to use ordi-

nary diligence to deliver the message. He is not required to make diligent search.

Held error to instruct the jury that it was not due diligence to intrust a guaranteed message to a stranger to carry on foot a distance of two and a half miles. His only duty was to select a trusty messenger.

WESTERN UNION TELEGRAPH COMPANY V. HARRIET JONES.

Mississippi Supreme Court, April, 1892.

(69 Miss. 658.)

TELEGRAPH STATUTE.—NON-DELIVERY OF MESSAGE.

A statute imposing a penalty for failure to transmit and deliver telegrams promptly applies in every case where there is an obligation and default. A message having been received for transmission, the company cannot excuse itself by the fact that it had no office at the place of destination; or that the telegram was not written on one of the company's blanks; or that it attempted to transmit the message by telephone.

APPEAL by defendant below from judgment of Circuit Court, Hinds county. The important facts are sufficiently indicated in the opinion.

Mayes & Harris, for appellant.

M. M. McLeod, for appellee.

CAMPBELL, C. J., delivered the opinion of the court: There is no error in the rulings of the court on the trial of this case, and as the result reached was not complained of in the Circuit Court, but was acquiesced in for the purpose of entitling the defendant to appeal to this court, and test the correctness of the rulings of the judge, we will not disturb it. We assume that the verdict is right, since no

motion was made to set it aside, and we find no fault with the action of the court specially excepted to.

The fact that the message was written on paper other than the blanks usually employed, made no difference, since it was received and paid for as a message to be sent; and the fact that the company had no office or agent at Clinton is not an excuse for failure to transmit and deliver the message received by its agent, and paid for as such. It was peculiarly within the apparent scope of the agency of the company's agent at Jackson to know to what places messages could be sent, and, having received the message to be sent to a place where the company had a wire, the company was liable for the failure to transmit and deliver, according to the contract with the sender.

If the agent who received the message for transmission, not knowing that Clinton was a place at which the company did no business, had sought the plaintiff, on learning his mistake, and had informed her of it, and returned her the money paid him, a different question would have been presented; but he did not do this, and, recognizing his obligation to send the message, did it by telephone, which was offered to be shown as an excuse for the non-delivery complained of. There was no error in excluding the proposed evidence of the transmission of the message by telephone, as its non-delivery was the cause of complaint. If it had been promptly delivered to the person to whom it was addressed, all ground of complaint would have been prevented.

The penalty prescribed by statute for failure to transmit and deliver messages promptly applies in every case in which there is an obligation to do these things.

Affirmed.

NOTE.—See note to next case.



WESTERN UNION TELEGRAPH CO. v. C. D. CLARKE ET AL.

Mississippi Supreme Court, Dec. 18, 1898.

(71 Miss. 157.)

TELEGRAPH STATUTE

A statute imposing a penalty upon telegraph companies for failure to "transmit correctly" is satisfied by substantial accuracy.

ACTION for penalty for error in telegram. Appeal by defendant below.

Sykes & Bristow and *Mayes & Harris*, for appellant.

Clarke & Clarke and *W. D. Anderson*, for appellees.

CAMPBELL, C. J., delivered the opinion of the court: Section 4326 of the Code of 1892, in embracing the requirement to "transmit correctly," as well as deliver messages in a reasonable time, did not intend to impose a penalty for a departure from the exact terms of the message, where no harm was done and the message was transmitted with such substantial accuracy as to perform its office and effect its purpose. If the message transmitted and delivered must be a reproduction, *verbatim et literatim et punctuatim*, of that written to be sent, or the penalty denounced by the section may be recovered, the statute is needlessly severe. No interest requires such nicety, and it may be justly assumed that the Legislature had in view not only "reasonable time" for delivery, but reasonable conformity to the terms of the message, so as to present it to the sendee in such terms as to effect the purpose for which it is sent. Where harm results, damage accrues, and the statutory penalty is given; but where, as in this case, no harm was done, an inadvertent departure from the letter of

the message does not incur the penalty. The Legislature must have meant to require to transmit correctly in substance, not mere form. It had regard to the thought, and not the mere symbols of the message. Otherwise, any departure would subject to the penalty, which would be unreasonable. Can it be supposed that for changing my signature or address from Campbell to Camel, or Campel, or Cambelle, or Cawmel, according to the form of writing it sometimes met with, in a message sent by me or to me, and promptly delivered, and accomplishing its purpose, and doing no harm, the penalty would be incurred? To so hold would impute to the Legislature a spirit of injustice and cruelty that would seriously reflect on its attempt to legislate in this matter for the public interest. To limit the operation of the section as we do is to secure all by it that will subserve the interest of the public, which is the object of the law.

The plaintiff was not entitled to recover the penalties, or the cost of the messages, which were transmitted and accomplished their purpose.

Reversed, and remanded for a new trial.

NOTE.—For Mississippi telegraph cases earlier than the two foregoing, see vol. 3, p. 685, note.

In *W. U. Tel. Co. v. McLaurin*, Miss. Sup. Court, Nov. 23, 1892, held that where a message received on Sunday for transmission, summoning an attorney to appear in court on Monday morning, was not delivered until Monday evening, the company is liable both for the statutory penalty and for special damages, whether or not the sending of the message was a work of necessity which would warrant its being sent on Sunday.

MARY CONNELL, Plaintiff in Error, v. THE WESTERN
UNION TELEGRAPH COMPANY.

Missouri Supreme Court, March 2, 1892.

(108 Mo. 459.)

DELAY OF TELEGRAM.—MISSOURI STATUTE.—INTERSTATE COMMERCE.

The Missouri statute which imposes a penalty upon telegraph companies for failure to transmit messages promptly and impartially, applies only to transmission, not to delivery in another State.

It does not violate the interstate commerce provisions of the Federal Constitution.

Cases of this series cited in opinion: *Burnett v. W. U. Tel. Co.*, vol. 2, p. 687; *W. U. Tel. Co. v. Pendleton*, vol. 1, p. 682.

APPEAL to court *in banc*, from judgment of Circuit Court, Pettis county, awarding statutory penalty to plaintiff.

W. S. Shirk, for plaintiff in error.

C. R. Yeater, for defendant in error.

BRACE, J.: This cause is certified here from the Kansas City Court of Appeals as involving a constitutional question. The error complained of is the judgment of the Circuit Court of Pettis county, sustaining a general demurrer to the petition, which is as follows:

"Plaintiff, for cause of action, states that she is a resident of the city of Sedalia, Missouri, and that the defendant is a corporation organized and incorporated under the laws of the State of Missouri, and engaged in the business of transmitting and delivering telegraphic messages from said city of Sedalia to other cities and towns in this and the surrounding States, among others the city of Leavenworth,

in the State of Kansas. That on the 13th day of December, A. D. 1889, she delivered to the defendant's agent, at its office in the city of Sedalia, for transmission to and delivery at the said city of Leavenworth, the following message, to wit:

December 13th, 1889.

Matt Connell, Soldiers' Home: Your child is dying.

MARY.

That, upon delivering said message to defendant's agent at said office, she paid the defendant the usual and customary charges for sending and delivering the same, as established by the rules and regulations of defendant, to wit, the sum of fifty cents, and that the defendant, through its said agent, did then and there receive said message for transmission and delivery to said Matt Connell, at the Soldiers' Home, in said city of Leavenworth, and did accept and receive the aforesaid charge for so doing; that it then and thereupon became the duty of the defendant to transmit and deliver said message to the said Matt Connell promptly, and with impartiality and in good faith.

"Plaintiff avers that the defendant did not transmit and deliver said message promptly, but that it negligently and carelessly failed to deliver said message to the said Matt Connell until the 21st day of February, 1890, although said Matt Connell was, constantly, from said 13th day of December, 1889, until said 21st day of February, 1890, an inmate of the Soldiers' Home, in the said city of Leavenworth, and was well known to its officers and other inmates, and if the defendant had at any time made inquiry for said Matt Connell, at said place, he would have been immediately found, and said message delivered.

"Whereupon plaintiff says that, under and by virtue of the statutes of the State of Missouri in such case made and provided, she is entitled to have and recover from the defendant, for its aforesaid wrongful act in failing and neglecting to transmit and deliver said message promptly as aforesaid, the sum of two hundred dollars, together with

her costs herein laid out and expended, and for which plaintiff prays judgment.

Section 2725, Revised Statutes 1889, upon which this action is based, makes it the duty of every telegraph company

To provide sufficient facilities at all its offices for the dispatch of the business of the public, to receive dispatches from and for other telephone or telegraph lines, and from or for any individual; and on payment or tender of their usual charges for transmitting dispatches, as established by the rules and regulations of such telephone or telegraph line, to transmit the same promptly, and with impartiality and good faith, under a penalty of two hundred dollars for every neglect or refusal so to do, to be recovered with costs of suit by civil action by the person or company sending or desiring to send such dispatch, one-half the amount recovered to be retained by the plaintiff, and one-half to be paid into the county public school fund of the county in which the suit was instituted; and the burden of proof shall be upon the company to show that the wire was engaged as the reason for the delay in transmitting such dispatch.

I. This section is, in form and substance, a penal statute, and subject to the rules of construction which obtain in respect of such statutes, and which require that "no case shall be held to fall within it which does not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment." Endlich on Interp. of Statutes, p. 2; *Burnett v. Tel. Co.*, 39 Mo. App. 599.

Another rule is also to be observed in its construction, that, as such a statute can have no extra territorial force, it must be presumed that the Legislature did not intend to exceed its jurisdiction, or design it to operate beyond the territorial limits of its jurisdiction. Rorer on Interstate Law, p. 148; Endlich on Interp. of Statutes, section 160.

Applying these rules to the statute in question and the case in hand, the duty imposed upon the telegraph company by this section was to receive and transmit plaintiff's message "promptly, and with impartiality and good faith," as soon as its wire was disengaged from previous messages; for a failure to discharge which duty the penalty sued for is imposed. Now, what is the duty set out in the petition? Not that it was the duty of the defendant to receive and transmit the message, but to transmit and deliver it.

Wherein is it charged that the defendant failed to discharge its duty? Not in that it failed to receive and transmit the message, but in "that it negligently and carelessly failed to deliver said message to the said Matt Connell until the 21st of February, 1890," at the Soldiers' Home in the city of Leavenworth, in the State of Kansas.

The duty imposed by the statute upon the defendant was to receive plaintiff's message at Sedalia, Missouri, and transmit it over its line to the point of destination, assuming that its line extended to that point. It is not charged that the defendant did not perform this duty which it was enjoined by the statute to perform at Sedalia, Missouri, but that it failed to discharge another duty, that of delivering it to Matt Connell at Leavenworth, Kansas. This failure to deliver the message at that point to the person to whom it was directed may have been an act of negligence for which the defendant might be made to respond in damages; but it is not the failure of duty for which the statute imposes the penalty sued for; consequently the petition did not state a cause of action on the statute, and the demurrer was properly sustained.

II. If this construction of section 2725 be correct, it disposes of the case; and, as thus construed, it is not seen how that section impinges upon the power of Congress under the Constitution to regulate commerce among the several States. Its force is wholly spent within the territorial limits of the State upon a citizen of the State in requiring the performance of a duty which that citizen owes to the people of the State, and to commerce itself, in the conduct of its business within the State. It imposes no burden upon this branch of commerce, throws no impediment in its way, and does not seek to regulate the transmission and delivery of interstate telegrams in any manner, either within or without its own borders. The whole scope of its provisions is to foster this branch of commerce within the borders of the State by stimulating those engaged in its conduct to the discharge of their duty to the world of commerce in which it has become such an important factor.

It does not enter the field of regulation, but leaves that field where the Constitution places it, under the operation of such laws of Congress as may be enacted, regulating the transmission and delivery of interstate telegrams, and in no way encroaches upon its power in that behalf. The State, in this enactment, neither taxes, restricts nor regulates the transmission of interstate telegrams, but it simply attempts, so far as its own citizens are concerned, to secure their transmission. This law may aid and support, but never can conflict with, any law that Congress or any State may pass on the subject, in the interest of commerce.

In this respect this law differs essentially from the statute of Indiana, which was held (*Western Union Tel. Co. v. Pendleton*, 122 U. S. 347) to be an invasion of the province of Congress in respect to interstate telegrams; because, in effect, that law attempted to regulate the mode and order of transmission of interstate telegrams, and the delivery of such dispatches at places situated in other States, by providing that telegrams of a certain character should have preference in transmission, and for the delivery of all dispatches, by a messenger, to the person to whom the same were addressed. The statute under consideration contains no such obnoxious provisions, and it is not seen why it may not well stand, notwithstanding that decision, it being therein conceded that the State, within the reservation that it does not encroach upon the free exercise of the powers vested in Congress, may make all necessary provisions in respect of the use of its property by a telegraph company within its jurisdiction which the comfort and convenience of the community may require.

We find nothing in the other cases cited from the United States Reports, or in any case since the one in the 122 U. S., that militates against this construction of section 2725.

The judgment is affirmed. All concur

NOTE.—See note to next case.

**MATTHEW CONNELL, Plaintiff in Error, v. THE WESTERN
UNION TELEGRAPH COMPANY.**

Missouri Supreme Court, May 16, 1893.

(116 Mo. 84.)

DELAY OF TELEGRAM.—DAMAGES.—MENTAL DISTRESS.

For mental distress alone, due to the non-delivery of a telegram resulting in the inability of the addressee to reach his dying child, damages cannot be recovered against the telegraph company.

Cases of this series cited in opinion: *So Relle v. W. U. Tel. Co.*, vol. 1, p. 848; *Gulf, &c. Co. v. I. Levy*, vol. 1, p. 536; *Chapman v. W. U. Tel. Co.*, vol. 4, p. 686; *Stuart v. W. U. Tel. Co.*, vol. 2, p. 771; *W. U. Tel. Co. v. Hall*, vol. 2, p. 868; *Gulf, &c. Co. v. Miller*, vol. 2, p. 781; *W. U. Tel. Co. v. Cooper*, vol. 2, p. 795; *W. U. Tel. Co. v. Broesche*, vol. 2, p. 815; *W. U. Tel. Co. v. Simpson*, vol. 2, p. 819; *W. U. Tel. Co. v. Adams*, vol. 3, p. 768; *Reese v. W. U. Tel. Co.*, vol. 3, p. 640; *W. U. Tel. Co. v. Henderson*, vol. 3, p. 570; *Thompson v. W. U. Tel. Co.*, vol. 3, p. 750; *Chapman v. W. U. Tel. Co.*, vol. 3, p. 670; *Young v. W. U. Tel. Co.*, vol. 3, p. 734; *Crawson v. W. U. Tel. Co.*, vol. 3, p. 820; *Chase v. W. U. Tel. Co.*, vol. 3, p. 817; *West v. W. U. Tel. Co.*, vol. 2, p. 588; *Russell v. W. U. Tel. Co.*, vol. 1, p. 658; *Tyler v. W. U. Tel. Co.*, *post*; *Kester v. W. U. Tel. Co.*, *post*.

APPEAL by plaintiff below from judgment of Circuit Court, Pettis county. Facts stated in opinion.

Wm. S. Shirk for plaintiff in error.

Karnes, Holmes & Krauthoff, with *Charles E. Yeater* and *G. H. Fearons*, for defendant in error.

GAUNT, P. J.: This is an action for damages for the negligence of defendant in failing to deliver to plaintiff the following telegraphic message sent to him by his wife:

Connell v. Telegraph Co.

SEDALIA, Missouri, December . 1889.

To Matt Connell, Soldiers' Home, Leavenworth, Kansas: Your child is dying.

MARY.

The plaintiff alleged that his wife paid the customary charge, fifty cents, for its transmission, and that he had refunded that sum to her.

Plaintiff then alleges that his child died on the twenty-fourth day of December, 1889, "and that if said message had been transmitted and delivered with any degree of diligence or promptness whatever, he would have been able to be present with his said child during its last sickness, and at its death; and that by reason of the great negligence and carelessness of defendant in failing to deliver said message, and of being thereby deprived of being with his said child during its last sickness, and at its death, he lost not only fifty cents paid for sending said message, but also suffered great anguish and pain of mind and body, and was physically and mentally prostrated when he learned that his child had died and had been buried without knowledge on his part of its sickness and death."

He alleges that he was an inmate of the Soldiers' Home from December 13, 1889, continuously, till February 21, 1890, and by the slightest diligence he could have been found. He alleges further that he is damaged in the sum of five thousand dollars, for which he prays judgment.

On motion of defendant, the Circuit Court struck out of the petition the words, "*But also suffered great anguish and pain of mind and body, and was physically and mentally prostrated, when he learned that his child had died, and had been buried without knowledge on his part of its sickness and death.*" This left the action pending for the fifty cents only and, plaintiff declining to amend, the court sustained another motion to dismiss for want of jurisdiction of the subject matter of the action.

The sole question discussed by the appellant in this case is this: "Where a telegraph company is advised by the contents of a message that great mental suffering and pain

will naturally result from its neglect to transmit and deliver the message promptly, can damages be recovered by the sendee for such mental agony and distress, caused by a failure to promptly transmit and deliver ?'

The proposition, it will be observed, relates simply to damages arising from a breach of contract.

Prior to this time there had been but one opinion expressed in the decisions of this court, and that is clearly adverse to the contention of the appellant, and this is not questioned by the able counsel who represents the appellant; but he urges that inasmuch as telegraphy is of comparatively recent origin, we should, in view of the functions it performs, make an exception in the construction of the contracts made by those engaged in it and the damages which flow from a breach thereof. That an action for mental anguish disconnected with physical injury, for the breach of a contract, could not be maintained at common law, with the single exception of the breach of a marriage contract, we think is abundantly established. *Wood's Mayne on Damages*, 75; *Lynch v. Knight*, 9 House Lords, 577; *Walsh v. Railroad*, 42 Wis. 23; *Wyman v. Leavitt*, 71 Me. 227; *Wyman v. Leavitt*, 36 Am. Rep. 303.

The subject came under review in this court in *Trigg v. Railroad*, 74 Mo. 147. In that case, a lady, with two little children, was carried beyond the station to which she was traveling. It was not claimed that any indignity was offered, or that she suffered personal injury. The trial court instructed that the jury might award her damages for the anxiety and suspense of mind suffered in consequence of the delay in reaching her destination. This court in reversing the cause, said: "The instruction as to the measure of damages was erroneous. Neither the anxiety and suspense of mind suffered by the plaintiff in consequence of the delay, nor the effect upon her health, nor the danger to which she was exposed in consequence of the train being stopped an insufficient length of time, were proper elements of damage in this case, *as no personal injury* was received by the plaintiff and no circumstances

of aggravation attended the wrongful act complained of. If the anxiety and suspense of mind suffered by the plaintiff in consequence of the delay in this case is a ground of recovery, similar suspense and anxiety of mind would be an equally good ground of recovery in a case where a railroad train should wrongfully stop to take on a passenger. The general rule is that 'pain of mind when connected with bodily injury, is the subject of damages ; but it must be so connected in order to be included in the estimate, unless the injury is accompanied by circumstances of malice, insult or inhumanity.' " Citing *Pierce on Railroads* (ed. 1881), 302 ; *Railroad v. Birney*, 71 Ill. 391.

The authority of this case has never been questioned by the courts of this State, to our knowledge. The rule announced is in strict harmony with that of the courts of last resort in our sister States, until, in 1881, the Supreme Court of Texas, in *So Belle v. Tel. Co.*, 55 Tex. 306, announced the doctrine that the sender of a social telegram could recover for the mental anguish caused by delay in its delivery.

The authorities relied upon by the Supreme Court of Texas in that case were actions for physical injuries, in which the mental agony formed an inseparable part, a doctrine never questioned in this State since *Porter v. Railroad*, 71 Mo. 66. The learned commissioner who prepared the opinion did quote a suggestion of the authors of *Shearman and Redfield on Negligence* to the effect that they thought such an action ought to lie, but they did not claim that any court in this country or England had previously sustained their view. The Texas case has been followed in that State in a great number of cases, and has been adopted in Indiana, North Carolina, Kentucky, Alabama, and Tennessee.

On the other hand, this new departure has been vigorously assailed and denied by the Supreme Courts of Mississippi, Georgia, Kansas, and in Dakota, and in a most luminous dissenting opinion by Judge LUTON, of the Supreme Court of Tennessee, now judge of the United States

Circuit Court for the sixth circuit, in which FOLKES, judge, concurred. The majority of the Supreme Court of Tennessee do not go to the length contended for by the appellant here. The majority lay great stress upon the fact that by virtue of a statute in Tennessee, a cause of action is given to the aggrieved party for damages for failure to deliver any message. Hence they argue that as the party has the right to some damages by virtue of the statute, they conclude they may add the anguish of mind as an element. It is impossible to escape the feeling that the very able judges were resorting to a fiction to justify them in supporting the action. The case of *So Relle v. Tel. Co.*, 55 Tex. 310, has been nowhere more flatly repudiated than by the Supreme Court of Texas itself in *Railroad v. Levy*, 59 Tex. 563.

Judge STAYTON, in an able and lucid discussion of the authorities, demonstrates that "the cases in which damages have been allowed for mental distress will be found to be cases in which the mental distress was the incident to a bodily injury suffered by the distressed person, or cases of injury to reputation or property in which pecuniary damage was shown, or the act such that the law presumes some damage, however slight, from the act complained of. They are not cases in which the bodily injury or other wrong was suffered by one person and the mental distress by another."

The reasoning of the Supreme Court of Tennessee, that because the Code gave an action for some damages that opened the way to add damages for mental distress, is, we think, at complete variance with our own decisions. In this State we have a damage act which gives a right of action where death has resulted, and similar statutes exist in most of the States.

The construction placed upon these statutes has been that no relative, save those named in the statute, can recover at all, and no recovery as a *solatium* for mental suffering is allowed, where not expressly given by the statute. Field on Damages, 498; *Porter v. Railroad*, 71 Mo. 66; *Parsons v. Railroad*, 94 Mo. 286; *Schaub v. Railroad*, 106 Mo. 74.

But it is said damages for injury to the feelings have always been allowed in actions founded upon a breach of

promise to marry, and this is true in this as in other States. *Wilbur v. Johnson*, 58 Mo. 600; *Bird v. Thompson*, 96 Mo. 424; but it has always been regarded as an exception to the rule. In this action, plaintiff's pecuniary loss forms an important element. The action is of common law origin, and at common law, the husband, on marriage, became liable for the wife's debts, and for support in a manner and style commensurate with his own social standing, and evidence of his station in life and *financial condition has always been admitted*. *Wilbur v. Johnson, supra*. As was well said by COOPER, judge, in *Rogers v. Tel. Co.*, 68 Miss. 748: "This action, though in form one for the breach of contract, partakes in several features of the characteristics of an action for the wilful tort, and, though the damages recoverable by the plaintiff for mental suffering are spoken of as compensatory, the fervent language of the courts indicates how shadowy is the line that separates them from those strictly pecuniary." *Harrison v. Swift*, 13 Allen, 144; *Kurtz v. Frank*, 76 Ind. 595; *Thorn v. Knapp*, 42 N. Y. 475; *Coryell v. Colbaugh*, 1 N. J. L. 77. "Especially those cases in which evidence of seduction is admitted to ascertain the damages."

"So much, indeed, does the motive of the defendant enter into the question of damages, that in *Johnson v. Jenkins*, 24 N. Y. 252, he (the defendant) was permitted to give in evidence, in mitigation of damages, the fact that he refused to consummate the marriage because of the settled opposition of his mother, who was in infirm health."

These considerations sufficiently indicate the reasons that actuated the courts to make this exception. Few precedents for this action will be found where the defendant was impecunious. The learned counsel has collected various other cases in which mental anguish was recognized as an element of damage, and concludes with the query, if allowed in these, why not in this action?

Let us consider these in the order of his brief.

Assault and battery. Under this head is cited the case of
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proof of some service by the daughter has been invariably required to sustain it, and the same rule is rigidly adhered to in *Magee v. Holland*, 27 N. J. L. 86, to which we are cited by counsel, for the forcible abduction of a daughter.

In the case of enticing away a daughter, we are referred to *Stowe v. Heywood*, 7 Allen, 118. The court permitted damages for mental suffering on the express ground that it was a wilful injury, and declined to say whether such damages could ever be recovered for negligence alone, as in the case at bar. This case illustrates the greatest difficulty in estimating damages for mental suffering. Judge MORTCALF says: "Mental suffering * * * cannot be measured aright by outward manifestations; for there may be a show of great distress where little or none is felt. And great distress may be concealed and borne in silence with an apparently quiet mind. *At inquieto saepe simulatur quies*.

And we nowhere find that any other evidence of mental suffering, besides that of the injury which was the alleged cause of the action, was ever before admitted." The court reversed the case because the trial court permitted evidence tending to show plaintiff suffered from pain and anxiety of mind.

It is hardly necessary to add that in a case of libel or slander, if the words are not actionable *per se*, special damages must be alleged and proved. When they are actionable *per se*, they are so construed because of their evident tendency to degrade the citizen in the estimation of his neighbors, and in both cases they are malicious.

We have now gone through the list, and we find in none of them any reason for adopting the rule that, for the mere negligent failure to comply with a contract, damages may be recovered on the sole ground of injured feelings, when the plaintiff has suffered no physical injury. The law up to this time has essayed to protect the person and property of the individual. All the cases cited are based upon this principle. Reputation is included in the person. *Johnson v. Bradstreet Co.*, 87 Ga. 79.

The damages claimed in this action cannot be allowed as

exemplary damages. The Texas court in one case did so hold, but afterwards repudiated it. *Stuart v. Tel. Co.*, 66 Texas, 580.

But we do not think that the courts of England and of this country, prior to 1881, were rejecting actions like this on a mere arbitrary assumption unsustained by reason. A doctrine which has passed so long unchallenged by the great jurists who have adorned the bench of our State and Federal courts, is not to be lightly discarded at the behest of ingenious and able counsel.

The law is and ought to be more stable than this. It has long been the boast of common law writers, that the common law was a system founded on reason, and one of its maxims has ever been, that when the reason upon which a law was based ceased, the law itself ceased. Speaking for ourselves, we are satisfied that the common law denying an action for mental distress alone was founded upon the best of reason and an enlightened public policy.

And we question if the real reasons were ever more clearly and satisfactorily stated than by Judge LUTON, which we adopt:

“The reason why an independent action for such damages cannot and ought not to be sustained is found in the remoteness of such damages, and in the metaphysical character of such an injury considered apart from physical pain. Such injuries are generally more sentimental than substantial. Depending largely upon physical and nervous condition, the suffering of one under precisely the same circumstances would be no test of the suffering of another. Vague and shadowy, there is no possible standard by which such an injury can be justly compensated, or even approximately measured. Easily simulated and impossible to disprove, it falls within all the objections to speculative damages, which are universally excluded, because of their uncertain character. That damages so imaginary, so metaphysical, so sentimental, shall be ascertained and assessed by a jury with *justness*, not by way of punishment to the defendant, but as mere compensation to the plaintiff, is not to be ex-

pected. That the grief natural to the death of a loved relative *shall be separated* from the added grief and anguish resulting from delayed information of such mortal illness or death, and compensation given for the latter only, is the task imposed by the law, as determined by the majority. * * * It is legitimate to consider the evils to which such a precedent logically leads. Upon what sound legal considerations can this court refuse to award damages for injury to the feelings, mental distress and humiliation where such injury results from the breach of any contract? Take the case of a debtor who agrees to return the money borrowed on a certain day, who breaches his agreement wilfully with knowledge that such breach on his part will probably result in the financial ruin and dishonor of his disappointed creditor. Why shall not such a debtor, in addition to the debt and the interest, also compensate his creditor for this ruin, or at least for his mental sufferings? * * * Upon what principle can we longer refuse to entertain an action for injured feelings consequent upon the use of abusive and defamatory language not charging a crime or resulting in special pecuniary damages? Mental distress is or may be in some cases as real as bodily pain, and it as certainly results from language not amounting to an imputation of crime, yet such actions have always been dismissed as not authorized by the law as it has come down to us, and as it has been for all time administered."

Why, if this rule is to become the law of this State in regard to this contract, shall it not apply to all disappointments and mental sufferings caused by delays in railroad trains? Telegraph companies are common carriers, so are railroad companies, and yet this court in the *Trigg* case held the company not liable for mental anguish as an independent cause of action for a mere act of negligence.

A similar conclusion was also reached in the United States Circuit Court, for the fourth circuit, in *Wilcox v. Railroad*, 52 Fed. Rep. 264, where the plaintiff made a special contract for a train to take him to the bedside of a sick parent. The court held that the trouble of mind

caused by the delay at a railroad station could not be made the basis of an action, saying: "But we know of no decided case which holds that mental pain alone, unattended by injury to the person, caused by simple negligence, can sustain an action. The plaintiff was the subject of two mental pains, one for the condition of the sick person, the other, from the delay at the station, the latter only being the subject of this action. It cannot be pretended that damages from the latter cause of 'anxiety' and 'suspense,' uncertain, indefinite, undefinable, unascertainable, dependent so largely on the peculiar temperament of the person suffering the delay, was in the contemplation of the defendant when it entered into the contract." *Griffin v. Colver*, 18 N. Y. 489; *Telegraph Co. v. Hall*, 124 U. S. 444. But, as before said, if we establish the rule as to one common carrier or private person, with what sort of consistency can we refuse to extend it to all? The courts of Texas have already spoken of a similar case as "intolerable litigation."

We see no reason for making this innovation or exception. The Legislature has imposed a penalty for each infraction of its duty in delaying a message, and it seems very clear to us that if it is to become the policy of the State to adopt this new rule, the Legislature and not this court should do it.

The common law has always attempted to deal with the citizen and his rights and wrongs in a practical way, and the declared object of awarding damages is to give compensation for pecuniary loss. The right in a civil action to inflict punishment by way of punitive damages has been ably controverted. The allowance of damages for wounded feelings, when they are the concomitant or result of a physical injury is placed rightfully on the ground that the mind is as much a part of the body as the bones and muscles, and an injury to the body included the whole and its effects were not separable, but the experience of every judge and lawyer teaches him how unsatisfactory in these personal injury cases are the verdicts of juries. They are

utterly inconsistent, and the courts do not attempt to justify these inconsistencies upon any other theory than that it is the sole province of the jury to fix the amount. The result is that in nearly every appeal that reaches this court, one ground for reversal is the excessive damages awarded. And the right of this court to interfere at all on this ground is seriously challenged. It is no uncommon thing to have the appellee voluntarily enter a *remittitur* to save his verdict from the charge of passion or prejudice.

Under the circumstances, is it wise to venture upon the far more speculative field of mental anguish, without guide and without compass? We think not. We have examined the cases in the courts of Kentucky, Indiana, Tennessee, Alabama and North Carolina. They are all based upon the *So Belle* case, in 55 Tex., which we have shown stands upon no previous adjudication, but is opposed by the *Levy* case in 59 Tex., which to our minds completely refutes it. The cases holding this view are *Stuart v. Tel. Co.*, 66 Tex. 580; *Railroad v. Wilson*, 69 Tex. 739; *Tel. Co. v. Cooper*, 71 Tex. 507; *Tel. Co. v. Broesche*, 72 Tex. 654; *Tel. Co. v. Simpson*, 73 Tex. 423; *Tel. Co. v. Adams*, 75 Tex. 531; *Wadsworth v. Tel. Co.*, 86 Tenn. 695; *Reese v. Tel. Co.*, 123 Ind. 294; *Beasley v. Tel. Co.*, 39 Fed. Rep. 181; *Tel. Co. v. Henderson*, 89 Ala. 510; *Thompson v. Tel. Co.*, 166 N. C. 549; *Chapman v. Tel. Co.*, 13 S. W. Rep. 880; *Young v. Tel. Co.*, 107 N. C. 370; Thompson on Electricity, sec. 378, and cases cited.

The cases opposing this view are notably the dissenting opinion of Judge LURTON in 86 Tenn. 695; *Chapman v. Tel. Co.*, 15 S. E. Rep. 901; *Chapman v. Tel. Co.*, 39 American and English Corporation cases, 567, in which Judge LUMPKIN, of the Supreme Court of Georgia, reviews all the cases in a most admirable tone and with great clearness: *Wilcox v. Railroad*, Cir. Ct. of App. (Fourth Cir.), 52 Fed. Rep. 564; *Crawson v. Tel. Co.*, 47 Fed. Rep. 544; *Chase v. Tel. Co.*, 44 Fed. Rep. 544, where all the authorities are cited; *West v. Tel. Co.*, 39 Kan. 93; *Russell v. Tel. Co.*, 3 Dak. 315; *Tel. Co. v. Rogers*, 68 Miss. 748; *Lynch v. Knight*, 9 House of

Lords 577; *Victoria's Railway Commissioners v. James Coullas and Mary Coullas*, L. R. 13 App. Cases, 222; *Tyler v. Tel. Co.*, 54 Fed. Rep. 634; *Kester v. Tel. Co.*, TART, Judge, 55 Fed. Rep. 603.

We are fully aware that the plaintiff's claim appeals strongly to the sensibilities, but to adopt that view we must either be guilty of adopting one rule of damages for one class of common carriers, and the breach of their contracts, or we must conclude that all of our predecessors in the great common law courts were at fault, and henceforth repudiate, not only their utterances but our own, on this subject, and this we have no inclination to do. We prefer to travel yet awhile *super antiquas vias*.

If, in the evolution of society and the law, this innovation should be deemed necessary, the Legislature can be safely trusted to introduce it, with those limitations and safeguards which will be absolutely necessary, judging from the variety of cases that have sprung up since the promulgation of the Texas case.

Our conclusion is, the judgment should be and is affirmed. All concur.

NOTE.—This case is cited in *Summerfield v. W. U. Tel. Co.*, post. See vol. 3, p. 710, note.

See INDEX, title "Mental Distress."

The following are memoranda of telegraph cases, other than the two foregoing, decided in Missouri:

Bassett v. W. U. Tel. Co., St. Louis Court of Appeals, March 8, 1893 (48 App. 566).

If a telegraph company receives a message for transmission on Sunday but fails to send it, the sender need not, in an action for the statutory penalty, aver that the sending of the message was a work of necessity or charity. The company must allege and prove the facts necessary to excuse itself.

Smith-Fraser Boot & Shoe Co. v. W. U. Tel. Co., Kansas City Court of Appeals, April 4, 1892 (49 App. 99).

The stipulation in a telegraph blank limiting the time to present claims for damages, upheld as reasonable; it appearing that the plaintiff knew within the time limited of the delay and consequent damage, or with ordinary diligence could have known.

Montgomery v. W. U. Tel. Co., Kansas City Court of Appeals, June 18, 1893 (60 App. 591).

Same as above as to reasonableness of time limit.

"Any claim" in the blank includes action for penalty.

Reed v. W. U. Tel. Co., Kansas City Court of Appeals, Oct., 1892 (66 App. 168).

It appearing to the court that questions arose involving the construction of the interstate commerce provision of the Federal Constitution and the post-roads act of Congress, which was without the jurisdiction of the court, the case was certified to the Supreme Court to determine those questions.

The action was for damages for negligence in transmitting a telegram.

Lee v. W. U. Tel. Co., St. Louis Court of Appeals, Nov. 22, 1893 (51 App. 375).

Where the telegram relates to the business of the addressee's employer, which fact is not disclosed to the company, the right of action is in the addressee.

Dudley v. W. U. Tel. Co., Kansas City Court of Appeals, May 22, 1893 (54 App. 491).

The penalty imposed by section 2725, R. S., 1889, for failure to transmit messages promptly, and with impartiality and good faith, applies to transmission only, not to delivery.

Newman v. W. U. Tel. Co., St. Louis Court of Appeals, May 28, 1893 (54 App. 434).

The sender of a message cannot recover for mental distress only.

Ellis R. Smith v. W. U. Tel. Co., Kansas City Court of Appeals, Jan. 8 and March 26, 1894 (57 App. 259).

In an action to recover the statutory penalty for delay of a telegram, if from all the evidence it appears that the wires, instruments or electric apparatus of the defendant along the line of transmission of the telegram were not in working order, and that not knowing this the operator at the transmitting office made proper attempts to transmit the message and could not do so by reason of such break in the service, so that the operator at the receiving office could not know of the call, the *prima facie* proof of negligence due to the fact of long delay in transmission is overcome.

The statute making it the duty of a telegraph agent to notify senders of messages if the line is not in working order does not apply if such fact is not and cannot be known to the agent.

Kendall v. W. U. Tel. Co., Kansas City Court of Appeals, Jan. 29, 1894 (56 App. 193).

A delay of twelve hours in the transmission and delivery of a message which should have been delivered within 45 minutes, raises a presumption of negligence.

Sixty days claim clause in a telegraph blank is reasonable and valid. The

Telegraph Co. v. Underwood.

failure to comply with it is an affirmative defense in an action for the statutory penalty.

Wood v. W. U. Tel. Co., St. Louis Court of Appeals, Nov. 7, 1894 (99 App. 286).

The statutory penalty attaches, though the failure to transmit and deliver was not due to partiality or bad faith.

The complaint must allege delivery for transmission at an office of the company

PACIFIC TELEGRAPH COMPANY V. JOHN I. UNDERWOOD.

Nebraska Supreme Court, June 29, 1893.

(87 Neb. 815.)

ERROR IN TELEGRAM.—LIMITING TIME TO PRESENT CLAIM.

(Head-note by the court):

The legal status of a telegraph company is practically that of a common carrier of intelligence for hire, and such company is bound to correctly and promptly transmit and deliver messages intrusted to it, and cannot by contract relieve itself, either in whole or in part, from liability for injury or loss resulting from its own negligence.

A telegraph company had printed on its message blanks: "The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message." *Held*, an attempt on the part of the telegraph company to limit its liability; that this clause, if regarded as a contract, was without consideration, unjust, unreasonable, and violative of section 12, chapter 89a, Compiled Statutes.

Cases of this series cited in opinion: *Tyler v. W. U. Tel. Co.*, vol. 1, p. 14; *W. U. Tel. Co. v. Crall*, vol. 2, p. 575; *Gills v. W. U. Tel. Co.*, id., p. 841; *Johnson v. W. U. Tel. Co.*, id., p. 863; *W. U. Tel. Co. v. Longwell*, id., p. 628.

COMMISSIONERS' decision. Appeal by defendant below from judgment of District Court, Lancaster county. Facts stated in opinion.

Marquette, Deweese & Hall, for plaintiff in error.

Charles E. Magoon, contra.

RAGAN, C.: John Underwood sued the Pacific Telegraph Company in the District Court of Lancaster county. The facts involved in the case are substantially: Underwood lived in Lincoln, Nebraska. He had some household goods in Richmond, Indiana. He desired these shipped to Lincoln, and wrote to one Lawrence, at Richmond, asking the rate on goods. Lawrence delivered to a telegraph company at Richmond the following dispatch:

RICHMOND, Indiana, July 2, 1894.

To John I. Underwood, Lincoln, Nebraska: Rate, seventy-six dollars per car; \$1.09 per hundred local.

L. L. LAWRENCE.

This telegram, when delivered to Underwood, read:

"RICHMOND, Indiana, July 2, 1894.

To John I. Underwood, Lincoln, Nebraska: Rate, twenty-six dollars per car; \$1.09 per hundred local.

I. L. LAWRENCE."

Underwood, relying upon the correctness of this telegram as delivered, ordered his goods shipped as a car lot, and on their arrival at Lincoln was obliged to pay \$76 freight. He brought this suit to recover the difference between the \$76 and \$26.

The telegraph company defended on three grounds:

1st. That the mistake in the telegram was made on another line:

2nd. That Underwood did not present his claim for damages to the telegraph company within 60 days after the date of the telegram:

3rd. That Underwood was not damaged by the mistake. There was a verdict and judgment for Underwood, and the telegraph company brings the case here for review.

The first error assigned is that the court erred in admitting in evidence the telegram as it originally started from Richmond, for the reason that it is a different one from that set out in the petition. On looking into the record, we find that Underwood claims that the telegraph company

delivered to him a telegram which read "twenty-six dollars per car," but he avers that this telegram, as originally sent, read "seventy-six dollars per car," and that through the negligence of the telegraph company it was altered. The principal objection, however, is that Underwood, on the trial to the jury, put in evidence only the written part of the telegram, without putting in the printed matter on the blank. The printed matter alluded to was usually found on all telegraph blanks, and contains, among other conditions and terms, this: "This company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message." The telegraph company did not undertake that the printed conditions on the telegraph blank should be transmitted. These conditions were no part of the message sent. The evidence corresponded with the pleadings, was competent and there was no error in its admission.

The second error alleged is the refusal of the court to give the jury this instruction: "If the jury find from the evidence that the telegraphic blank on which was written the message received by the plaintiff from the defendant contained a clause or provision to the effect that the company will not hold itself liable for errors or delay in transmission or delivery of unrepeatd messages in any case where the claim is not presented in writing within sixty days after the sending of the message, then before the plaintiff can recover, he must show that he presented his claim to the defendant in writing within sixty days after receiving the message; and if the jury find from the evidence that the plaintiff did not so present his claim in writing within sixty days after the sending of the telegram, then the defendant is not liable, and the plaintiff cannot recover, and your verdict should be for the defendant."

There are four reasons why the refusal of the court to give this instruction was correct:

This suit is not based on a contract, but is grounded in tort.

A telegraph company is a common carrier of intelli-

gence for hire, bound to promptly and correctly transmit and deliver all messages intrusted to it, and cannot by contract exempt itself from liability for its own negligence.

The clause printed on the telegraph blank, to the effect that the telegraph company would not be liable for damages in any case unless the claim was presented in writing in 60 days, was and is unreasonable, and wholly without consideration, if viewed as a contract between the telegraph company and the sender of the message, and an attempt on the part of the telegraph company to enact for itself a statute of limitations. If it can make its liability for negligence depend on notice of claim being given in 60 days, it may make it 6 days. If liability can be made to depend upon the notice being in writing, it can limit it to pen and ink. The laws of this commonwealth are for the protection and government of corporations and individuals alike, and all citizens should transact their business with reference to these laws. The attempt, so often indulged in by insurance and telegraph companies, to prescribe for themselves a law, is not one that appeals to the judgment or commends itself to the conscience of this court. See, on this subject: *Tyler, Ullman & Co. v. Western Union Telegraph Co.*, 60 Ill. 421; *Western Union Telegraph Co. v. Crall*, 21 Am. & Eng. Corp. Cas. [Kan.] 95; *Gillis v. Western Union Telegraph Co.*, 25 id. [Vt.] 568, and cases there cited; *Johnson v. Western Union Telegraph Co.*, 21 id. [Ga.] 114; *Western Union Telegraph Co. v. Longwill*, 25 id. [N. M.] 559.

2. The instruction asked was violative of the statute of the State, section 12, chapter 89a, Compiled Statutes. "Any telegraph company engaged in the transmission of telegraphic dispatches is hereby declared to be liable for non-delivery of dispatches intrusted to its care, and for all mistakes in transmitting messages made by any person in its employ, and for all damages resulting from the failure to perform any other duty required by law; and any such telegraph company shall not be exempted from any such

RILEY V. WESTERN UNION TELEGRAPH COMPANY.

City Court of New York, Gen. Term, Dec., 1893.

(6 Misc. Rep. 231.)

DELAY OF TELEGRAM.—LIMITING LIABILITY.—DAMAGES.

Conditions in telegraph blanks, limiting the liability of the company, first, in respect to unrepeatd messages, and second, in case of delays arising from unavoidable interruption in the working of the lines, held reasonable and valid.

In such a case, in absence of wilful misconduct or gross negligence, the company, even if negligent, can be charged only with the cost of sending the message.

Cases of this series cited in opinion: *Pearson v. W. U. Tel. Co.*, vol. 8, p. 734; *Riley v. W. U. Tel. Co.*, vol. 2, p. 650; *Young v. W. U. Tel. Co.*, vol. 1, p. 187; *Sprague v. W. U. Tel. Co.*, vol. 1, p. 204; *Mullen v. W. U. Tel. Co.*, vol. 2, p. 600.

APPEAL by defendant from judgment entered upon a verdict.

L. J. Morrison, for plaintiff (respondent).

Rush Taggart, for defendant (appellant).

MCCARTHY, J.: This is an action brought to recover damages for injuries sustained September 13, 1892, by a sailing yacht, resulting, as is alleged, from the negligence and carelessness of the defendant, the Western Union Telegraph Company, a corporation organized under the general statutes of New York, in not promptly delivering a message written upon one of the defendant's regular message forms and intrusted by the plaintiff to it for transmission to James R. Mack at Bath Beach, Long Island, as follows:

1 Ask Harry take boat to club house, going to storm.

RILEY.

Mr. Van Cleef testified he received it about four P. M., to the best of his recollection, and that at the time he received it Mrs. Grumbrede asked him if he could take the boat to the yacht club, and he answered, "If I had had the dispatch an hour ago I could have done so, but not then; it was impossible for me alone to take it then." The storm came up about noon, increasing in violence throughout the day.

The boat went ashore some time during the night, after seven or eight o'clock in the evening.

On the part of the defendant the testimony showed that the message was sent from the Grand street office in the usual course of business, and was received at the main office of the defendant, 195 Broadway, New York city, before one o'clock, at which time the operator "called" the Bath Beach office, but could not "raise" it, and she made a note to this effect on the back of the message. Similar attempts were made, with like result, to communicate with the Bath Beach office at one-fifteen, one-twenty-five, one thirty, one-forty, one-fifty, two and two-ten P. M., all of which were noted on the back of the message. The message was sent at two-ten P. M., was received at Bath Beach at two-twenty-two o'clock, and was sent out for delivery in the usual course of business about two-forty P. M. It further appeared that the telegraph wire between New York city and Bath Beach was "grounded" or "dead" from twelve o'clock noon to two-twenty-two P. M. of that day. It was delivered at the "Grange," where it was addressed, at two-forty-five P. M., as shown by plaintiff's witnesses. The jury found for plaintiff in the sum of \$234.50.

Defendant moved for a new trial, which was denied, and judgment was entered for the amount of the verdict and costs, aggregating \$360.87.

Defendant appeals from both the order denying the motion for a new trial and from the judgment.

The statement of the terms by the defendant upon which

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and a consequent misdelivery, are *prima facie* evidence of neglect and want of care of the operator, and cast the burden upon the company of explaining the error and showing that it occurred without fault. This is upon the supposition that the message is received for transmission unconditionally. For the purposes of this appeal, it is assumed, but not decided, that this message was not subject to the terms and conditions ordinarily attached to the receipt of messages for transmission, but that the defendant is subject to all the liability which legally results from a receipt of a message and a naked agreement to transmit the same to its destination for a reasonable compensation paid therefor. If the terms and conditions ordinarily imposed were a part of the contract, the question would arise whether the defendant would not be protected against liability for the 'error and delay' in the delivery of the dispatch. See *MacAndrew v. Electric Tel. Co.*, 17 C. B. 3; *Ellis v. Am. Tel. Co.*, 13 Allen, 226."

It is conceded that the day on which the message was sent was a stormy one, which began at eleven-thirty o'clock A. M., and increased in violence toward the night.

It appears by the testimony that besides this the operator in the general office in New York city made repeated efforts to transmit said message between one and two-twenty P. M., and that the wire was "grounded" or "dead," and thus the defendant was unable to send any message until two-twenty o'clock P. M., when for the first time it secured communication; that the operator at Bath Beach at about twelve-forty-five o'clock P. M. discovered his wire connecting with New York city was in trouble or "grounded" or "dead," and he was prevented from transmitting any messages over the same. He endeavored to transmit messages between that time (twelve-forty-five P. M.) and two-twenty o'clock P. M., when he received the one in question. That he kept testing between the intervals of ten and fifteen minutes until he finally received this message. Thus it seems that this interruption and delay was not wilful, nor was it due to any gross negligence.

The authorities recognize a distinction in the degree of negligence by the degree of care required (Bouvier's Law Dictionary, 225) as follows: "Thus, in the first class, the bailee is required to exercise *only slight care*, and is *responsible of course only for gross negligence*. In the second, he is required to exercise great care, and is responsible even for slight neglect. In the third, he is required to exercise ordinary care, and is responsible for ordinary neglect."

Gross negligence is, therefore, the want of slight care.

We have examined the testimony carefully and cannot find any evidence showing a want of slight care, and when such arises, it then becomes a question of law for the court, and it is error for the court to submit the case to the jury. They cannot be permitted to speculate or conjecture, nor to determine the question by bias, prejudice or passion. There must be some foundation as well as substance in the evidence upon which they can act. The defendant did all that could be done under the circumstances, and the delay was not unreasonable. It was undoubtedly for the purpose of guarding against such occurrences as the present that the contract contained in the blank message was made. *Pearson v. W. U. Tel. Co.*, 124 N. Y. 266, 267, 269; *Riley v. Western Union Tel. Co.*, 109 id. 235, 236.

ALLEN, J., at page 236, says; "It is not the case of a message delivered to the operator and not sent by him from his office." This certainly would be gross negligence.

DALY, Ch. J., in *Sprague v. W. U. Tel. Co.*, 6 Daly, 200 (67 N. Y. 590), says: "The expense which the plaintiff was necessarily put to through their neglect is not embraced by any of the stipulations limiting the damages to the amount received for sending the message."

"*This was not a mistake or delay in the transmission or delivery, or a non-delivery, but an entire breach of the contract by a neglect to send the message at all, and which rendered them liable for such damages as were the direct, natural and proximate consequences of their total neglect to do what they had to do.*" *De Rutte v. N. Y. Telegraph Co.*, 1 Daly, 547.

Here, in our judgment, is a clear and decisive explanation of what is wilful misconduct or gross negligence. The cases cited by the respondents have been carefully examined and we find that they do not apply.

They are either where the contract was not as broad as the one at bar, or in other words, not containing the same limitations, or was, as in *Mulliken v. Western Union Tel. Co.*, 110 N. Y., 403, on a new contract without limitation, made with the person to whom the message was to be sent or delivered. There being no evidence of willful misconduct or gross negligence, the trial justice erred in not granting the defendant's requests: that the court direct a verdict for the plaintiff not to exceed twenty-five cents, the amount paid for the telegram or message; that the court charge the jury that there is no evidence from which they can find that the defendant was guilty of any negligence in failing to deliver the message, or in delay as to the delivery.

For these reasons, judgment should be reversed and new trial granted, with costs to the appellant to abide the event.

NEWBURGER, J., concurs.

Judgment reversed and new trial granted, with costs to appellant to abide the event.

NOTE.—See note, vol. 2, p. 782.

"forty-seven" in the message as delivered, for "twenty-seven" in the message sent, by reason whereof the plaintiffs' tobacco was sold for a price less than it would otherwise have brought in the market. The message was written on the blank furnished by the Western Union Telegraph Company, with the well-known stipulation upon it that the company would not be liable for damages caused by mistakes or delays, unless repeated. This message was delivered to and sent by the agent of the defendant, the Postal Telegraph Co., but we prefer to treat the question presented as if there were but a single and controlling point involved, and to this we address ourselves.

It was not ordered by the sender to be repeated, and was therefore what is known as an unrepeatable message. Upon the admissions in the pleadings, and the verdict in response to the issues fixing the value of the tobacco at the time of the sale, the plaintiffs moved for judgment in their favor for the difference between the sum actually received by them and the value of the tobacco. His honor, in accordance with the decision in *Lassiter v. Telegraph Co.*, 89 N. C. 834, denied the plaintiff's demand and signed judgment in favor of the plaintiffs for the sum paid by the sender to the defendant for the transmission of the message. The plaintiffs appealed, and this brings up again the question whether the stipulation upon the back of the blank, and made part of the contract, as before referred to, is valid and binding upon the parties.

It was held by a divided court in *Lassiter v. Telegraph Co.*, *supra*, that a stipulation contained in a form used by a telegraph company in its business operations, to the effect that it will not be responsible for mistakes in transmitting unrepeatable messages, is a reasonable one and will be enforced by the courts. *Lassiter's* was the first case which came before this court involving a construction of the said stipulation and its effects upon the rights and liabilities of the parties thereto. This court, recognizing the persuasive authority of the courts of last resort in other States, adopted the views expressed in a majority of the cases which had been

gence was invoked, and it was held that while for ordinary or slight negligence they would not be responsible, yet they would be held to account for gross or wilful negligence.

But negligence is the failure to exercise that care which, under the circumstances of the case, a prudent man ought to use. There can be no degrees in negligence in this matter. In ascertaining what damages may be awarded against one for injury by reason of negligence, the question whether it was gross or ordinary may determine as to punitive or compensatory damages; or where the doctrine of comparative negligence is recognized, it may be necessary to distinguish between degrees; but where there is a contract to transmit a message for reward, a failure to perform the undertaking is either excusable or negligent — if negligent, the party injured thereby is entitled to his damages, not according to the degree of negligence at all, but in proportion to his injury, unless it be a case in which punitive damages are allowed. If, on account of an electrical disturbance in the atmosphere, a message could not be sent, so that there was delay; or it could be but imperfectly sent, so that words were dropped; or if from any other cause, not to be provided against with the appliances afforded by science and by a reasonable foresight, there was a failure to comply with the contract, these were matters provided for by law, and not necessary to be stipulated against in the contract.

The old principle that one cannot provide by contract against liability for negligence, applies to every species and degree of negligence or tort. Cooley on Torts, 687. In *Lassiter v. Telegraph Co.*, *supra*, this exemption from liability "is not extended to acts of omission involving gross negligence, but is confined to such as are incident to the service, and which may occur when there is but slight culpability in its officers and employes."

In *Pegram v. Telegraph Co.*, 97 N. C. 57, it is said that the stipulation on the back of the blanks restraining liability for unreported messages, where the complaint is not of a mistake in the message, but for delay or failure

in delivery, is unreasonable and void. In *Cannon v. Telegraph Co.*, 100 N. C. 300, the doctrine in *Lassiter's* case is affirmed, but the language of the opinion in *Telegraph Co. v. Hall*, 124 U. S. 444, is quoted with approval: "Of course, where the negligence of the telegraph company consists, not in delaying the transmission of the message, but in transmitting a message erroneously, so as to mislead the party to whom it is addressed, and on the faith of which he acts in the purchase or sale of property, the actual loss, based upon changes in market value, is clearly within the rule for estimating damages."

In *Thompson v. Telegraph Co.*, 107 N. C. 449, reasserting that this stipulation, as far as delay is concerned, is void, a doubt is intimated as to its validity at all, and it is plainly said, though not necessary to be declared in the decision upon the point involved in that case, "the more recent cases, founded upon the more thorough investigation and thought given to the subject, are to the effect that any stipulation restricting the liability of the telegraph company for negligence, even as to mistakes in transmission, is void." We refer to the cases from other States cited in the opinion just referred to. *Gillis v. Telegraph Co.*, 61 Vt. 461; *Ayer v. Telegraph Co.*, 79 Me. 493.

We have come to the conclusion, after a natural hesitation, to overrule a decision of a majority of this court announced by the former very learned chief justice, that the true principle is, that telegraph companies are corporations erected for the public benefit, endowed with special privileges, such as the right of eminent domain, performing the most important functions of commerce, and, in cases where celerity and dispatch are necessary, taking the place of the postal service, that at least ordinary skill and diligence are required of them, and that public policy forbids they should be protected from liability for damage by reason of any degree of negligence. Gray on Communications by Telegraph, sec. 46, and cases there cited; Thompson on Electricity, secs. 235, 236 and note.

As the art of telegraphy has now attained such high eff-

ciency, there is less reason why any rule of safeguard to the public interest should be relaxed.

The principles of the law are always the same, but they extend their grasp and take in the necessity for those new things which the advance in science and art provide for the public safety and convenience, and require them to be used. The increasing number of higher courts, both State and Federal, with their ever accumulating decisions, render it impracticable that we should cite many of the authorities bearing upon the subject we have under consideration. Most of them are referred to in Gray's Communication by Telegraph, ch. 5; Thompson on Electricity, chs. 6 and 8; 2 Harris on Damages by Corporations, sec. 869 *et seq.*

There is an additional proviso in the printed endorsement upon the telegraphic message blank to that which we have just considered:

Nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any repeated message, beyond fifty times the sum received for sending the same, unless specially insured.

The reasons which have brought us to the conclusion that the condition we have already considered is void, will apply with equal force to the one now presented. "The precept of public policy which, on the ground of the inequality of the parties, the compulsion of the employer and the duties of a telegraph company towards the public, dictates the invalidity of a stipulation limiting the liability of a telegraph company to nothing beyond the price paid for transmission, must equally deny validity to a stipulation limiting the liability of a telegraph company to fifty times that price." Gray on Communication by Tel., sec. 51.

There is error. Upon the admissions and the verdict, judgment should be rendered in favor of the plaintiffs and against the defendant for the sum claimed in the judgment presented by them as set out in the record.

Judgment reversed.

lyn and Staten Island, to telegraph him immediately in case his sister's body should be found; that he returned to McKeesport, and a few days thereafter, to wit, on May 12th, the following message was delivered to him on the street by the defendant company:

"May 12, 1889. Quarantine, S. C. (I).

To Daniel S. Tobin, McKeesport, Pa.: Found the body of Mary E. Tobin.

Coroner HUGHES, Clifton, S. C. (I)"

In the message as delivered, the C. was written over the I. Plaintiff further testified that he was uncertain whether the message meant Staten Island or South Carolina; that, being Sunday, the telegraph office was open only between eight and ten o'clock, A. M., and four and six o'clock P. M.; that being in doubt whence the message came, he went to the office to inquire, but finding it closed he showed the message to a clerk in a drug store in the same building who informed him that it was South Carolina; that the next morning by an early train he started for Clifton, South Carolina, and on his return from that State he found that his sister's body had been recovered at Clifton, Staten Island.

The appeal was based upon the refusal of the trial judge to charge the jury as follows:

1. That under all the evidence in this case, their verdict should be for the defendant.

2. That as under the uncontradicted evidence this is an unrepeatable message, and no request was made to repeat the same, or charge paid therefor, there can be no recovery beyond the amount paid for sending the message.

George B. Gordon (with him *John Dalsell* and *William Scott*), for the appellant.

T. C. Jones, for the appellee.

Per CURIAM: The learned judge below could not have

withdrawn this case from the jury, as requested by defendant's first point. See first specification. There was a palpable error in the telegram, by which the plaintiff was misled and by reason thereof incurred considerable expense in a fruitless journey to South Carolina. It is no answer to this to say that some persons might not have been misled by such a blunder, and would have made further inquiry before starting upon the journey. In point of fact, the plaintiff was misled, and we cannot say he was guilty of contributory negligence.

Nor do we think the fact that the message was not repeated has any bearing upon the case. See second specification. The condition in repeated messages applies to the person sending the message, not to its recipient. *W. U. Tel. Co. v. Richman*, 19 W. N. 569 (6 Cent. R. 505). In *N. Y. etc. Tel. Co. v. Dryburg*, 35 Pa. 298, it was held that the company was not excused from liability to third persons for damages sustained by the negligent transmission of an erroneous message, by the fact that the sender did not pay for its being repeated back, in accordance with a rule of the company whereby they limited their responsibility to the transmission of messages that should be repeated back. What has been said covers the remaining specifications of error.

Judgment affirmed.

NOTE.—See INDEX to this and prior volumes, titles "Contributory Negligence," "Receiver or Addressee;" also "Notes" upon said subjects.

The following additional cases were decided in the Supreme Court of Pennsylvania:

Smith v. W. U. Tel. Co., Supreme Court, Oct. 3, 1893 (150 Pa. 502).

Damage to credit only, without pecuniary loss, cannot be recovered against a telegraph company for delay of a message.

Fergusson v. Anglo-American Tel. Co., Supreme Court, Oct. 3, 1893 (151 Pa. 211).

Questions of pleading only.

SOUTH CAROLINA.—*Mood v. W. U. Tel. Co.*, Supreme Court, March 7, 1894 (40 S. C. 524).

Damages caused by neglect to deliver a telegram, resulting in plaintiff's loss of a fee, are remote and special, and, unless specially alleged in the complaint, cannot be recovered.

KIRBY v. WESTERN UNION TELEGRAPH CO.

South Dakota Supreme Court, June 26, 1898.

(4 So. Dak. 105.)

TELEGRAPH STATUTES.—LIMITING LIABILITY.

(Head-note, in part, by the court):

The statute law of this State (sections 8881-8910, Comp. Laws), makes a telegraph company, which offers to the public to carry telegraphic messages, a common carrier of such messages.

Such statutory provisions were not superseded nor repealed by section 11, art. 17, of the Constitution of the State, imposing upon the Legislature the duty of providing reasonable regulations, by general law, for giving effect to the right of a corporation organized for such purpose to construct and maintain lines of telegraph within the State.

While even as a common carrier a telegraph company has a right to enter into agreements with its patrons, limiting its liability, it cannot require the making of such agreements as a condition precedent to its fulfilling its duty, as a common carrier, of transmitting messages which are offered. This principle applied to the "unrepeated messages" and "sixty days" clauses of telegraph blanks.

Refusal of a telegraph company to transmit a message, upon the sole ground of the sender's refusal to present it upon a regular blank, containing stipulations limiting the liability of the company, held to subject the company to the penalty imposed by statute for refusal to send a telegram.

Also held, that the fact that substantially the same message was presented later in the day, upon a regular blank, and transmitted, did not affect the rights of either party.

Case of this series cited in opinion: *Hart v. W. U. Tel. Co.*, vol. 1, p. 784.

APPEAL by defendant from judgment of Minnehaha County Court. Facts stated in opinion.

Bailey & Voorhies (George H. Fearons, of counsel),
her appellant.

A. C. Boylan and Joe Kirby, for respondent.

KELLAM, J.: On the 4th day of January, 1892, the respondent offered to the appellant, at its office in the city of Sioux Falls, a written message, confessedly unobjectionable in matter, and requested that it be transmitted in the usual way to the party to whom it was addressed, and then and there offered to pay the usual compensation therefor. The message was written on ordinary white writing paper. The company declined to send the same unless written upon, or attached to, one of its message blanks. This the respondent refused to do unless the stipulations contained in such message blank should be first erased, so that he would not be bound thereby. Under these circumstances the message was refused by the company. Upon these facts, which appear to be undisputed, respondent brought an action against the appellant company to recover actual damages, and \$50 in addition thereto, under section 3910, Comp. Laws. The section reads as follows:

Every person whose message is refused or postponed, contrary to the provisions of this chapter, is entitled to recover from the carrier his actual damages, and fifty dollars in addition thereto.

Upon the trial the respondent proved his actual damages, and had a verdict for 25 cents actual and \$50 statutory damages. Upon this verdict judgment was entered, a new trial refused, and the company appeals.

While other assignments of error, which will be hereafter noticed, were presented and argued, it is evident that the major question is the right of the appellant company to insist upon the message being received and sent subject to the stipulations contained in the message blank, and if the person offering the message refuse to agree thereto, to decline to receive or transmit the same. If the law sustains the company's right to so insist, or to refuse the message, then, upon the facts in this case, respondent should not have recovered, for it is uncontradicted that the message was refused upon the distinct ground that the respondent positively declined to have it sent subject to the stipulations printed upon the message blank.

By the statute law of this State (section 3881, Comp. Laws),


Every one who offers to the public to carry persons, property, or messages is a common carrier of whatever he thus offers to carry.

That the word "messages," as here used, was intended to include telegraphic messages, is evident from the closely following sections, wherein a "carrier by telegraph" and a "carrier of messages by telegraph" are expressly named, and their duties as such defined. From the adoption of the Civil Code, in 1872, until the legislative session of 1873-74, the State of California had the same statutory provisions, but at the session named the above-quoted section was amended by inserting an express exception of "telegraphic messages." During the short time such original provision was there in force, we do not find any reported case in which it was considered. Prior to the adoption of such Code provision, the Supreme Court of that State had held in *Parks v. Telegraph Co.*, 13 Cal. 422, that the defendant company, as a general telegraph company, was a common carrier; but the decisions of the courts have been, with great unanimity, against this view, and under the amended statutes it is now so held in California. *Hart v. Telegraph Co.*, 68 Cal. 579 (6 Pac. Rep. 637). Appellant, however, advances the proposition that these provisions of the old Civil Code, being the sections of the Compiled Laws, above cited, which declare telegraph companies to be common carriers, are superseded and repealed by, because inconsistent with, the Constitution. This contention is founded largely upon section 11, art. 17, of the Constitution :

Any association or corporation organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph in this State, and to connect the same with other lines, and the Legislature shall by general laws, of uniform operation, provide reasonable regulations to give effect to this section. No telegraph company shall consolidate with, or hold a controlling interest in the stock or bonds of, any

other telegraph company owning a competing line, or acquire, by purchase or otherwise, any other competing line of telegraph.

We think appellant claims too much for this section. It simply declares the right of an association, corporation, or individual to construct and maintain telegraph lines within this State, and to connect them with other lines, and then forbids the consolidation of competing lines. To carry into effect this general right to construct and maintain, and this prohibition against consolidation, the Legislature is charged with the duty of providing suitable and reasonable laws and regulations, of uniform operation; regulations by and under which the right to construct and maintain may be used and exercised, and the prohibition of consolidation be enforced. We are not convinced that there is anything in the constitutional section which would forbid the Legislature now, if it had never been done before, to impose upon telegraph companies the character and duties of common carriers. But even if we understood this constitutional section to mean that the Legislature should provide reasonable regulations for the conduct of the current business of telegraph companies, we should not think it had the retroactive effect of repealing former legislation, even though assailed as unreasonable. It is a general rule that neither constitutions nor statutes should be so construed as to have a retroactive effect, unless such intention is clearly expressed. *Cutting v. Taylor* (S. D.), 51 N. W. Rep. 949; *Cooley Const. Lim.*, pp. 62, 63; *Suth. St. Const.*, sections 463, 464; *Allbyer v. State*, 10 Ohio St. 589; *People v. Gardner*, 59 Barb. 198; *Ex parte Burke*, 59 Cal. 6. Although peculiar to our State, and the statute itself an exceptional one, I think we must recognize its effect to be to make, in this jurisdiction, a telegraph company "a common carrier of whatever it thus offers to carry," and its duty to receive and transmit respondent's message must be tested by its rights and duties as a common carrier. An individual or corporation becomes a common carrier of just what it offers to carry. Its duty to



the public springs from its offer to the public, and must be measured by it ; so that the carrier who only offers to carry grain in canvas sacks cannot be required to carry grain in bulk. But while the carrier may thus, in general, determine for himself the character and condition of what he will carry, he cannot, by offering to carry for the public under a qualified liability, constitute himself a common carrier with such a liability, only, as he advertises to assume. As a common carrier it was appellant's legal duty, if able to do so, to accept and transmit respondent's message, if offered at a reasonable time and place, and if it was of a kind that it undertook or was accustomed to carry. Section 3882, Comp. Laws. The ability of appellant to receive and transmit the message ; that it was offered at a reasonable time and place ; and that the message itself, except as to the paper on which it was written, was of a kind that it was accustomed to carry, are not disputed.

The dominant question in this case, upon the merits, being whether the stipulations upon the message blank, or any of them, so far restricted appellant's liability as a common carrier as to justify respondent's refusal to consent to them, as a condition of having his message accepted and sent by appellant, we have thought it just to both parties to examine them severally, expressing our opinion upon each, so far as they are involved by the facts in this case. It is not claimed that either of the regulations or stipulations printed upon the message blank, and which respondent was required to assent to, offended against the rule of impartiality, which appellant, as a common carrier, was bound to observe. Respondent, however, strenuously insists that the stipulation on the printed blank would, if assented to by him, have the effect of relieving the company from a liability imposed upon it by law, as a common carrier, and consequently he ought not to be compelled to agree to it, as a condition of having his message sent.

The first matter objected to is as follows :

To guard against mistakes or delays, the sender of a message should order it repeated ; that is, telegraphed back to the original office for comparison. For this, one-half the regular rate is charged, in addition.

So much is not explanatory and advisory. Then follows:

It is agreed between the sender of the following message, and the company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any repeated message, beyond fifty times the sum received for sending the same, unless specially insured, nor, in any case from unavoidable interruption in the working of its lines, or for errors in cypher or obscure messages.

Then follow the rates for sending insured messages. The order in which the rates, terms, and conditions are stated, upon which the company would receive and transmit this message, are, of course, not important. The essential thing to know is,—did they tally with the duty of the company, as a common carrier? As such common carrier, it must insure, subject to conditions and exceptions hereinafter noticed, the correct transmission of the message, for which it was entitled to a just and reasonable compensation. This, by the printed form, it offered to do, and stated the compensation. There is no claim that the compensation named for such service was not just and reasonable, and no such question was raised. The effect of the printed condition is the same as though the rate for an insured message—that is, the compensation for assuming all the duties of a common carrier—had been first stated, and then had followed an offer that for a less compensation it would send the message without incurring the full liability of a common carrier. It left the respondent free to exercise his election as to which offer he would accept, and determine for himself whether he would pay the company for insuring the correct transmission of the message, as a common carrier, or pay less, and assume a part of the risk himself. A common carrier may have two rates for the transportation of goods—one covering its full common-law liability—the other a special or limited liability—so long as the shipper has a choice between them, at reasonable rates. He cannot be denied the right to have his goods carried by the carrier under its common law liability, but if he desires, and neither statute nor public policy forbid, he may enter into a special contract with the carrier, limiting its common-law

liability. *Railroad Co. v. Dill*, 48 Kan. 210 (29 Pac. Rep. 148). It is a matter of common knowledge that the sending office marks upon the message form the rate or compensation paid, and thus is preserved, for the protection of both parties, some evidence, at least, of the election of the sender, and the resulting contract. It was entirely competent for the appellant to limit by special contract its obligation as a common carrier. (Section 3886, Comp. Laws). The respondent was not obliged to make such a contract unless he chose. It was a matter of agreement between them. Parties who use telegraph lines are usually economical of their time. In most cases it is important that messages go at once. There is generally little time or opportunity for negotiation. As an expeditious and direct means of bringing both parties to a definite understanding, the company provides and furnishes to the public message forms containing its proposal of terms. The sender of a message may elect either. One of its offers covers its duty and liability as a common carrier. The sender may pay the tariff fixed for that service, and hold the company to its liability as a common carrier. We are unable to perceive how the offer of the company, to qualify its full liability as a common carrier, and accept a less compensation therefor, if the sender so desires, can affect the rights of either. The offer only becomes binding when accepted and signed, and the sender is under no compulsion. He may pay for and get the full liability of a common carrier, or pay less, and get a limited liability. The causes or conditions named in the stipulation as excusing full performance of the company's obligation, as a common carrier, are "unavoidable interruption in the working of its lines," and "errors in cypher or obscure messages." An "unavoidable interruption" is one that cannot or could not be avoided; and while the courts have not been strictly at one in their views as to what, in modern times, should be regarded as equivalent to "the act of God or the public enemy," of the old authorities, our statute (section 3899) expressly makes "any irresistible superhuman cause" sufficient ground for avoiding

the common carrier's liability, and section 3880 definitely fixes the measure of a telegraph company's duty in the transmission of messages to be the exercise of the "utmost diligence." We should be unwilling to rule, as a matter of law, particularly in view of the peculiar nature of telegraphic communication, that the utmost diligence could prevent, or successfully guard against, an "unavoidable interruption in the working of its lines." It may sometimes be a question for the jury whether the facts in a particular case bring it within the rule, but, where the interruption is proved to be broadly unavoidable, we think the company would not be liable. Whether, strictly, as a common carrier, appellant could exact, as a condition of the acceptance and transmission of a cypher or obscurely written message, that the sender should release it from liability for an incorrect sending, we need not now determine, for the refused message was confessedly neither.

It was further provided, as one of the stipulations to which respondent should consent, as a condition of sending his message, that "no responsibility regarding messages attaches to the company until the same are presented and accepted at one of its transmitting offices." This would seem to be quite consistent with the provisions of our statute making the carrier's duty to commence when whatever is to be carried is offered "at a reasonable time and place;" but that, like the stipulation as to cypher and obscurely written messages, is not a question in this case, for it is undisputed that the message was offered at the proper office of the appellant, so that such stipulation could not restrict or affect appellant's liability to respondent in this case.

Another stipulation of the message blank was that

The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission.

Appellant here insists that this condition does not propose, nor is its effect, to limit in any way its responsibility

as a common carrier, but is rather in the nature of a reasonable regulation, which appellant has a right to make, and which respondent, without any special contract on his part, was bound to observe, and cites cases in support of that view, notably that of *Express Co. v. Caldwell*, 21 Wall. 264. That case came before the court on plaintiff's demurrer to defendant's plea averring an express agreement upon the part of the plaintiff shipper that defendant should not be liable for loss or damage unless claim therefor was made within 90 days, and the question presented and decided was whether such an agreement, when made, was binding on the plaintiff. As to the necessity for such an agreement in order to so qualify its liability, the court says: "Certainly, it ought not to be admitted that a common carrier can be relieved from the full measure of that responsibility which ordinarily attends his occupation, without a clear and express stipulation to that effect obtained by him from his employer;" thus treating the stipulation in question not as a reasonable regulation, which it was competent for the carrier to make, and binding on the shipper without his consent, but as an agreement depending upon the consent of both parties. The court held that such an agreement was not such an attempted restriction of the carrier's responsibilities as would be invalid, but being reasonable, and fully assented to by both parties, it was binding; but that is not equivalent to saying that the carrier could compel the shipper to enter into such a contract, or require it as a condition of accepting his shipment. The very fact that such limitation of liability is the subject of agreement between the parties, implies that either party may refuse to make such agreement. However such agreement may be proved elsewhere, our statute provides that here it can only be manifested by the signature of the consignor, etc. Section 3886, Comp. Laws. In *Hartwell v. Express Co.*, 6 Dak. 463 (41 N. W. Rep. 732), our territorial Supreme Court rejected the defense of the carrier that the claim of loss upon which the action was founded was not presented

to the company within the time specified in its receipt, upon the distinct ground that under the controlling statute just referred to there was no special contract so providing, or binding upon the parties. It was a rule or regulation of the company, and as such was printed in the receipt delivered to the consignor, but the court held that it did not operate to make the liability of the company different in any respect from what it otherwise would be, because, not being signed by the consignor, it was not a special contract, as required and defined by the statute. Now if, without such special contract, the liability of the carrier is not thus limited, and with it it is, can the carrier refuse the offering of a shipper of "whatever it is accustomed to carry," unless he will so contract to limit the carrier's liability? We think not. The carrier's duty is to receive and carry subject to the full measure of liability, unless restricted by mutual agreement; and except as to "rate of hire, the time, place, and manner of delivery," such an agreement can only be shown by the signature of the shipper or sender. In *Tied. Lim.* pp. 256, 257, the learned author, after recognizing and discussing the right of a common carrier to modify and restrict its liability by special agreement with its patron or employer, says: "But the contract must be freely and voluntarily made. The carrier cannot refuse to take goods for carriage under the common-law liability if the consignor should refuse his assent to a limitation." To same effect see *New Jersey Steam Nav. Co. v. Merchant's Bank*, 6 How. 344. Nor can a carrier require of a shipper a waiver of any of his rights as a condition precedent to receiving and carrying his freight. *Railroad Co. v. Fagan* (Tex. Sup.), 9 S. W. Rep. 749. To sustain such a stipulation, where fairly made, is only to concede the right and power of the parties to make it, and comes far short of meaning that the carrier may exact the making of it as a condition precedent to the discharge of his duty as a common carrier. The statute was evidently intended to settle within this jurisdiction the question of how, and to what extent, the general liability of a common carrier may

be limited; and by providing, as it does, that it can only be accomplished by a special agreement, it has deliberately left it with either party to consent or to refuse to consent to such an agreement. The right to exercise such freedom of will by the respondent in this case would be denied and destroyed if he were compelled to consent under penalty of having his message refused. It has been suggested that respondent could find no right of action upon refusal of appellant to transmit his message unless he would agree to the stipulation, because, if made under such compulsion, it would not be enforceable against him, and therefore harmless; but such conclusion would be consistent with neither the duty of the appellant nor the right of the respondent. This right and this duty were correlative, and each was a measure of the other. Whatever respondent had a right to have sent, it was appellant's duty to send. If it was respondent's right to have his message transmitted without agreeing to this condition, it was appellant's duty to transmit it without imposing such condition; and it could not justify a refusal to send on the ground that the stipulation sought to be exacted as a condition precedent might, by proper effort on his part, be avoided by respondent, because made under compulsion, or because void and nugatory (if such statute should be held to apply to such a case), under section 3582, Comp. Laws.

Following the line of these views, we are of the opinion that appellant could not, as a common carrier, legally require respondent to enter into the agreement which we have just discussed, and so that it could not legally refuse to receive and transmit his message because he declined to make such agreement. Of course this decision will not be understood as touching the question of the right of the company to make and enforce reasonable general regulations for the convenient and orderly transaction of its business, and for the proper protection of its interests, consistent with its duties as a common carrier. The appellant did not object to the respondent's message because it was written on respondent's letter head, instead of on a

message blank, and so inconvenient for filing or preservation in accordance with the practice of appellant. Respondent offered to use the blank, if appellant would erase the contract which he would otherwise be required to assent to in using it. The issue between the parties was distinctly as to the right of appellant to require assent to the stipulations restricting its liability as a common carrier, and this decision covers only that question. Its refusal to receive and transmit respondent's message, under the facts proved, constituted a refusal, within the meaning of section 3910, Comp. Laws. Such refusal gave respondent a cause of action, and his right of action was not destroyed or affected by the fact that he afterwards sent substantially the same message. If to refuse the first message was an actionable wrong to respondent, persistence in it by appellant, to the extent of compelling respondent to submit to it, and to send another message on appellant's terms, did not cure or undo the first wrong. The testimony seems to show that respondent offered and attempted to have his message sent in the afternoon, between 2 and 4 o'clock; that it was refused, under the circumstances above recited; that he then wrote a letter to the party to whom he desired to send the message, but subsequently, and that evening, about 7 o'clock, feeling doubtful of its reaching the party in time, he went to the office, and sent upon one of appellant's blanks a message of very nearly the tenor of the message previously refused. There was nothing in this to waive the wrong of the refusal, or affect respondent's legal right to complain of it. * * *

The judgment of the County Court is affirmed. All the judges concurred.

NOTE.—A motion for rehearing of this case was granted Dec. 9, 1898 (4 S. Dak. 499), particularly for the purpose of considering the point raised by the appellant, "that section 3910, Comp. Laws, upon which respondent bases his action, is not now, and never has been, in force in this State."

† The case having the same title, reported 4 So. Dak. 463 (Dec. 15, 1898), was another action, the question under consideration being the sufficiency of a pleading for the purpose of recovering a penalty under said § 3910.

**GULF, COLORADO & SANTA FE RAILWAY COMPANY v. G.
T. GEER.**

Texas Court of Civil Appeals, Sept. 5, 1893.

(5 Tex. Civ. App. 349.)

FAILURE TO DELIVER TELEGRAM.—CONNECTING LINES.—LIMITING LIABILITY.

Where the sender of a message writes it on paper other than a regular telegraphic blank, and the operator at his request copies it upon a blank, the operator acts as agent of the sender, who is bound by a condition printed in the blank, relieving the company from liability for mistakes or delays of connecting lines.

In such a case an action against the original company could be brought only in the county of its domicile.

Case of this series cited in opinion: *W. U. Tel. Co. v. Edsell*, vol. 2, p. 828.

APPEAL by defendant below from judgment of District Court, Red River county. Facts stated in opinion.

Alexander & Clark and *J. W. Terry*, for appellant.

M. L. Sims and *S. W. Harman*, for appellee.

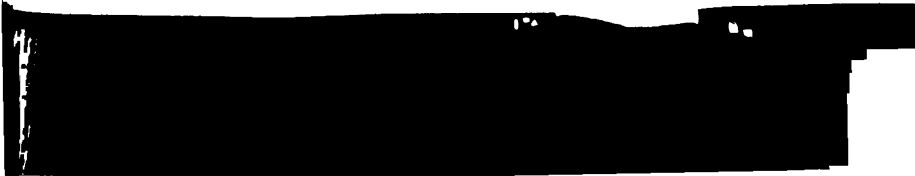
FINLEY, J.: Plaintiff's petition declared that the Western Union Telegraph Company was engaged on the 14th day of July, 1888, in operating a telegraph line between Paris, in Lamar county, and Detroit, in Red River county; that the Gulf, Colorado & Santa Fe Railway Company was at the same time engaged in operating a telegraph line between Dallas and Paris, connecting at the last-named point with the Western Union Telegraph Company; that on said date the Gulf, Colorado and Santa Fe Railway Company was engaged in receiving and transmitting messages for the public from Ladonia, Tex., over its own line, to Paris, Tex., and thence, over the line of the Western

together, are as follows : (2) "The court erred in failing to instruct the jury to find for the defendant on its plea of privilege to be sued in a county of its domicile, because, plaintiff having dismissed as to the Western Union Telegraph Company, this defendant [the Gulf, Colorado & Santa Fe Railway Company] was not by virtue of the pleadings and evidence, liable to plaintiff's action in Red River county." (3) "The evidence, without conflict, was that the message, as received and transmitted, was transcribed by the operator, at the express request and dictation of sender, on a regular telegraph blank, and the court erred in framing an issue on this question for the jury." The court refused defendant's charge specially asked, as follows : "You are instructed that the contract introduced in evidence, by virtue of which the telegram was sent, expressly limited the liability of defendant, the Gulf, Colorado & Santa Fe, to its own line ; and, the evidence introduced being uncontroverted that the defendant acted only as agent in delivering the message to its connecting line, you will find for defendant on the plea of privilege."

The undisputed evidence was that the original message, written upon a piece of brown paper, was rejected by the operator, as being unintelligible, and by him handed back to the person sent by plaintiff to deliver the same, to be rewritten by him on a telegraph blank furnished by the operator. Plaintiff's messenger stated to the operator that he was hot and nervous, and asked the operator to write down the message. The operator wrote down the message on a telegraphic blank, as it was dictated to him by the sender, and in that form sent off the message. The form upon which the message was written contained among others, the following printed stipulation :

This company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company, when necessary to reach its destination.

Appellant had no line extending into Red River county, and must necessarily have delivered the message to the



Western Union Telegraph Company at Paris, to be by it transmitted to the place of destination, in Red River county. The operator, in the preparation of the message, was acting for the sender, and not the company. The appellee cannot, therefore, complain of his act in writing the message upon the form usually used for the purpose, or in making a mistake in writing down the message at the request and at the dictation of Frensley, the person to whom the sender had committed the matter of having the message sent. *Telegraph Co. v. Foster*, 64 Tex. 220; *Telegraph Co. v. Edsall*, 63 Tex. 676. We think the rights of the parties must be determined as though the telegram had originally been written upon the telegraphic blank, and in that event the stipulation hereinbefore quoted would deprive the court of Red River county of jurisdiction over appellant, in a suit for the breach of the contract. If this proposition were not true, still, if the operator made a mistake in writing down the message, and addressed it to Detroit, Mich., instead of Detroit, Tex., the mistake would not be chargeable to the company, and the contract, as thus written, would not authorize the court in Red River county to take jurisdiction of appellant in a suit based thereon. This last proposition is properly raised by assignment. The cause is reversed and remanded.

NOTE.— See note to next case.

THE WESTERN UNION TELEGRAPH COMPANY V. I. E. JOBE.

Texas Court of Civil Appeals, Feb. 7, 1894.

(6 Tex. Civ. App. 403.)

DELAY OF TELEGRAM.—EXCUSE FOR DELAY.—LIMITING TIME.—CONSTITUTIONAL LAW.—DAMAGES.—EVIDENCE.

A telegraph company cannot be excused for unreasonable delay of a telegram, by reason of the fact that it had to surrender its wires for a time to a railroad company for the purpose of directing its trains.

A statute providing that stipulations in contracts limiting time to present claims to less than ninety days are unreasonable and void, is not unconstitutional. Statute applied to stipulation in telegraph blank.

Evidence showing how plaintiff's wife seemed to be affected by reason of failure to receive a telegram in season to reach her father before his death, also tending to show knowledge on the part of the company of the relationship between her and the person named in the telegram, held properly admitted.

Company held chargeable with cost of second message, caused by delay of first, but not with an item of carriage hire.

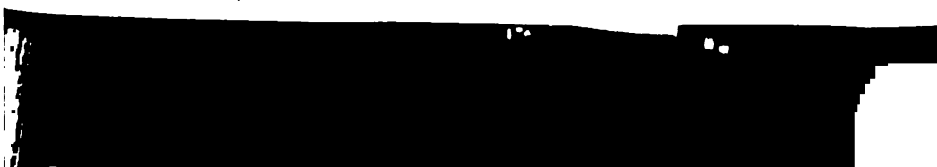
Cases of this series cited in opinion: *W. U. Tel. Co. v. Rosentrater*, vol. 8, p. 783; *W. U. Tel. Co. v. Adams*, vol. 8, p. 768.

FACTS stated in opinion.

Walton, Hill & Walton, for appellant.

Fly & McNeal, for appellee.

NEILL, Associate Justice: This suit was brought by appellee for the recovery of \$1,975 damages for alleged negligence in delivering a message giving notice of the serious illness of his wife's father, thereby depriving her of being with her father during the last hours of his life, from which deprivation she suffered great mental anguish. Damages were also claimed for expenses incurred by a relative sending another message and a hack, for the



expenses of which it was alleged the plaintiff became liable. The cause was tried by a jury, resulting in a verdict and judgment for plaintiff for \$750, from which judgment this appeal is taken.

CONCLUSIONS OF FACT.—1. Appellee's wife's father, J. L. Lampkin, being sick at Harwood, about 18 miles from Lockhart, where plaintiff and his wife then resided, J. L. Norwood, acting for appellee and his wife, delivered to appellant's agent at Harwood, at 6.10 o'clock P. M., August 1, 1891, for transmission by telegraph to Lockhart, Texas, the following message :

HARWOOD, Texas, 8-1.

To I. E. Jobe, Lockhart, Texas : Mr. Lampkin is worse. Come down at once.

J. L. NORWOOD.

For the transmission of which message he paid appellant's agent, for appellee, twenty-five cents. The message was written on one of appellant's blanks, upon which was printed the following :

Form No. 1. The Western Union Telegraph Company. The company transmits and delivers messages only on conditions limiting its liability, which have been assented to by the sender of the following message. Errors can be guarded against only by repeating a message back to the sending station for comparison, and the company will not hold itself liable for errors or delays in transmission or delivery of unrepeatd messages, beyond the amount of tolls paid thereon, nor in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission. This is an unrepeatd message, and is delivered by request of the sender under the conditions named above.

2. The relationship between plaintiff's wife and J. L. Lampkin, and the serious illness of the latter, were known to appellant's agent at Harwood when the telegram was delivered to her for transmission.

3. To transmit the message over appellant's wires to its destination, it was necessary to telegraph it to San Antonio, thence to San Marcos, and from there to Lockhart. The message was received by appellant's agent in Lockhart at

8.20 P. M., August 1, 1891, but was not delivered to appellee until near 10 A. M. on the following day. I. E. Jobe was well known in Lockhart, and resided near appellant's telegraph office, and by the exercise of ordinary care and diligence the message could have been delivered within a few minutes after it was received by appellant's agent in that town, but such care and diligence was not used by appellant's servants in its delivery.

4. J. L. Lampkin was on his death bed when the message was delivered for transmission to appellant's agent at Harwood, and died at 10 o'clock A. M., August 2, 1891.

5. That by reason of the delay in the delivery of the message to appellee, his wife was prevented from reaching her father's bedside until after his death, by reason of which she suffered great mental anguish.

CONCLUSIONS OF LAW.—The petition alleged that plaintiff's wife's father, J. L. Lampkin, being ill at Harwood, 18 miles from Lockhart, J. L. Norwood, acting for plaintiff and his wife, delivered to defendant's agent, at 4.30 o'clock P. M., August 1, 1891, the following message :

HARWOOD, Texas, 8-1.

To I. E. Jobe, Lockhart, Texas : Mr. Lampkin is worse. Come down at once.

J. L. NORWOOD.

That defendant had notice of the relationship of plaintiff's wife, and "that it was absolutely necessary that plaintiff should get the message in the shortest possible time." That defendant did not deliver it until 10.30 A. M. August 2, 1891. That plaintiff lived and did business as a merchant in Lockhart. That if the message had been delivered promptly plaintiff's wife could and would have been with her father in three hours after receipt of message. That the father died at 10.15 A. M. August 2, 1891. That, immediately after receiving the message, plaintiff's wife left for Harwood in a private conveyance.

That, by reason of the delay in the transmission of said message, another message, costing the sum of 40 cents, was

something ; and we think the exception to that part of the petition claiming damages for the cost of such a telegraphic inquiry was not good.

The matter in the petition to which the exception was urged was not directly submitted to the jury in the court's charge, but it was not withdrawn ; and as the appellant testified that " he heard that L. A. L. Lampkin sent a hack from Luling to Lockhart for his family, and it was worth four dollars for a hack from Luling to Lockhart," and the court having instructed the jury, if they found certain facts, to find for plaintiff " such damages as you deem just and proper, under all the evidence," the jury might have considered the item as an element of damages, and included it in its verdict. We think, however, that this error can be cured by a remittitur.

The appellant also pleaded that there was an error in the address in the message, as it was received in Lockhart, which was caused without its fault, and that its agent at Lockhart, on account of the error, did not and could not know for whom it was intended ; that, when received, its office was closed, and that on account of its being compelled, on the morning of the 2nd day of August, 1891, for a short time, to surrender the use of its lines to the use of the Missouri, Kansas & Texas Railway Company, in conducting and directing its trains, there may have been some delay in the discovery of the error and delivery of the message. The part of the answer by which appellant sought to excuse the delay upon the ground that its wires were surrendered to the railway company was excepted to by appellee, and the exception sustained. Upon the authority of *Telegraph Company v. Rosentreter*, 80 Tex., 406, we hold this was not error.

The appellant pleaded that, at the time the contract for the transmission of the message was entered into, it was stipulated that appellant should not be liable for damages in any case where the claim is not presented in writing within 60 days after sending the message, and that appellee's claim was not presented either within that period or

90 days. An exception was made by appellee, and sustained by the court, to the answer pleading this stipulation as a defense. We think the exception was properly sustained.

No stipulation in any contract requiring notice to be given of any claim for damages as a condition precedent to the right to sue thereon shall ever be valid unless such stipulation is reasonable, and any such stipulation fixing the time within which such notice shall be given at a less period than ninety days shall be void. (Acts 23d Leg., sec 2, p. 20).

We do not believe that the act from which the quotation is made is violative of article 3, section 35, of our Constitution. The stipulation requiring the notice to be given within a less period than 90 days is void, and no notice whatever was necessary as a condition precedent to the institution of this suit.

No notice being required, the ruling of the court upon evidence offered by appellee to prove that notice such as was stipulated was given within 90 days, and the refusal of the court to give the special charge relating to such testimony, asked by appellant, are immaterial, and in no way affected the merits of the case.

J. E. Lampkin, a son of the deceased, was allowed to testify, over appellant's objections, as follows: "We had sent messages to Lockhart in February and March, 1891, to Mrs. Ray and Mrs. Jobe, about father's condition." This testimony was admissible as a circumstance to show that appellant's agent knew at the time she received the message for transmission of the relationship existing between the deceased and appellee's wife; and, as it was the fact of sending such message which was sought to be established as a circumstance to prove such knowledge, it was unnecessary to produce the original messages for the purpose of proving it.

Witnesses were allowed to testify, over appellant's objections, as to how appellee's wife seemed to be affected by reason of her failure to get the message in time to reach her father before his death. In a case like this, where simi-

lar testimony was offered, our Supreme Court said: "As the jury would be instructed that they might, in assessing damages, include her mental anguish in their estimate, it was doubtless thought that evidence of mental condition * * * might be given. As juries may, from their own knowledge and experience of human nature, estimate damages proceeding from that cause, without any evidence, it is not important to produce it, and when produced it ought not, as a general rule, to have a controlling effect; and yet we are not able to see why the fact that mental anguish was felt, and was exhibited by speech or otherwise, may not be proved for what it may be worth. It at least furnishes no ground for setting aside a verdict that might be sustained without any evidence as to the existence or degree of mental pain." *Tel. Co. v. Adams*, 75 Texas, 535.

The quotation from the decision applies as well to the expression of appellant's wife, "Words of mine are inadequate to describe my feelings," and to her statement, "While I suffered great mental pain on account of not being with my father in his last moments, and with the remainder of his family at that time in their affliction, yet I suppose that any other child who was devoted to a father, and desired to be with him in his last hours, would suffer as much as I did," which were also admitted in evidence over appellant's objections.

It does not appear that the jury were influenced in their verdict by the remarks of appellee's counsel in his opening address. The remarks were improper, but the other counsel for appellee, in his closing address, strenuously insisted to the jury that it was their duty to banish from their minds the effect, if any, such remarks may have had upon them.

We think the charge of the court fully and correctly instructed the jury as to the law applicable to the case, and that there was no error in the court's refusal to give any of the special charges asked by appellant.

If the appellee will enter a remittitur in this court, by February 7, 1894, of five dollars on the judgment recovered

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in the court below, the judgment will be affirmed, and the costs of this appeal taxed against appellee; otherwise, the judgment will be reversed, and the cause remanded.

Appellee to remit \$5 and pay costs.

Then affirmed.

Justice FLY did not sit in this case.

NOTE.—In addition to the above are the following Texas cases decided during the period covered by this volume:

W. U. Tel. Co. v. Jennie Bruner, Supreme Court, March 8, 1893 (19 S. W. Rep. 149).

A telegraph company having accepted a message announcing the death of the sender's mother, and its agent having, upon request, promised to send it as quickly as possible, the company is not excusable for failure to send the message until the next morning, and making no effort to send it, the delay being caused by the fact that the terminal office could not be reached by the sending office that evening, which the operator knew but did not tell the sender.

T. W. Anderson et al. v. W. U. Tel. Co., Supreme Court, March 15, 1893 (84 Tex. 17).

An answer alleging that the messages for failure to deliver which the suit was brought were written upon blanks which contained a printed stipulation that a special charge would be made to cover cost of delivery beyond free delivery limit; that the addressee lived beyond said limit; and that no charges were paid or guaranteed for special delivery,—constitutes a good defense.

But it appearing that the message was not written on a blank, and had been received by the company without any stipulation as to free delivery limit, the company was bound at least to notify the sender that it could not be delivered without an additional charge.

W. U. Tel. Co. v. Chas. Beringer, Supreme Court, March 18, 1893 (84 Tex. 38).

The addressee of a telegram has a cause of action for injury by delay in transmission, though price of transmission paid by sender, and afterwards returned to him by the company.

Mental anguish due to failure to attend funeral of addressee's father may be recovered as damages in such case.

S. M. Lester v. W. U. Tel. Co., Supreme Court, April 13, 1893 (84 Tex. 313).

Stipulation exempting telegraph company from liability "for damages in any case where the claim is not presented within sixty days," is binding.

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and embraces every kind of damages resulting from the breach of the contract for transmission.

W. H. Smith v. W. U. Tel. Co., Supreme Court, April 19, 1892 (84 Tex. 359).

A telegraph company which has received for transmission a telegram from another company, to be delivered at a point beyond the line of the latter, and has received pay for such transmission, is liable for delay, and is not a mere agent of the other company.

W. U. Tel. Co. v. Cooke, Court of Civil Appeals, April 27, 1892 (22 S. W. 1005).

Questions of pleading and instructions to jury.

R. L. Bowen et al. v. W. U. Tel. Co.; *W. U. Tel. Co. v. R. L. Bowen et al.*, Supreme Court, April 29, 1892 (84 Tex. 476).

Question of damages mainly.

W. U. Tel. Co. v. J. C. Erwin, Supreme Court, May 31, 1892 (19 S. W. Rep. 1002).

A telegraph company is liable for damages resulting from the wrongful failure of a telegraph company to deliver a message, by which failure the addressee and his wife were prevented from being present to aid and direct about the funeral of the wife's father; they thus sustaining injury to the feelings and mental suffering.

W. U. Tel. Co. v. Cooper, Supreme Court, June 10, 1892 (20 S. W. 47).

Question of excessive damages.

W. U. Tel. Co. v. Wisdom, Supreme Court, June 14, 1892 (85 Tex. 261).

Request to charge based on contributory negligence held properly refused, first, because not pleaded, and second, upon the merits.

W. U. Tel. Co., v. Ward, Court of Appeals, June 15, 1892 (19 S. W. Rep. 806).

A telegraph company is liable for damages due to delay of a telegram announcing a death, although it had no notice as to what action the addressee expected to take in reference to the subject matter of the message. It was not necessary to disclose to the operator the relationship of the parties, or the reason for prompt delivery.

Gulf Coast & Santa Fe Ry. Co. v. Todd, Court of Appeals, June 8, 1892 (19 S. W. Rep. 761).

A telegraph company is liable for damages caused by the act of its agent in disclosing the contents of a telegram, notwithstanding the failure of the sender to present his claim within the time stipulated upon the printed blank, the disclosure of the telegram having been fraudulently concealed and disclosed only by accident, after the expiration of said time.

W. U. Tel. Co. v. Carter, Court of Civil Appeals, Oct. 14, 1892 (85 Tex. 580).

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message should have been delivered and that at a reasonable time after the omission to transmit had been discovered.

W. U. Tel. Co. v. R. H. Stephens, Court of Civil Appeals, Jan. 17, 1893 (3 Civ. App. 129).

In an action for damages for failure to send a message summoning a physician to a sick child of the sender, whereby the physician did not reach the child until it was past cure or relief, held that the company was guilty of gross negligence, by which the mental anguish of the appellee and his wife resulting from the sickness and death of their child was augmented, and that they were entitled to recover for such superadded pain and suffering.

W. U. Tel. Co. v. G. M. Shumate, Court of Civil Appeals, Feb. 8, 1893 (3 Civ. App. 429).

A telegraph company having received full pay for the transmission of a message to a point beyond the termination of its own line, without a contract limiting its liability to its own line, is bound to send the message to its destination and deliver it. Facts held sufficient to warrant finding that message was not written on blank containing stipulation or attached to blank when delivered to agent for transmission.

W. U. Tel. Co. v. G. L. Phillips, Court of Civil Appeals, March 9, 1893 (3 Civ. App. 608).

Held, error, to instruct the jury that the sixty days' time limited for presentation of claim for damages did not begin to run against the addressee until he learned that it had been presented for transmission.

A telegraph company and a railroad company having been sued jointly for failure to deliver a telegram transmitted partly over the lines of each, the jury cannot apportion the damages between the two defendants.

Questions of jurisdiction, &c., considered, as to a telegram presented in Texas to be transmitted into the Indian Territory.

W. U. Tel. Co. v. O. W. Carter, Court of Civil Appeals, March 9, 1893 (3 Civ. App. 624).

Delay of a telegram ordering a coffin in which to bury the son of the sender, from 4.30 P.M. of one day to 9 A. M. the next day, held negligence. In such a case mental distress held a proper element of damages.

W. U. Tel. Co. v. Berdine, Court of Civil Appeals, March 9, 1893 (3 Civ. App. 517).

Questions of evidence and damages.

W. U. Tel. Co. v. F. J. Williford, Court of Civil Appeals, March 30, 1893 (3 Civ. App. 574).

Held, that a telegram in this language, "How many beeves and bulls have you? Don't go away; will get them off. Answer," sufficiently advised the telegraph company that it related to a matter of business and that delay would probably cause loss, so as to charge the company with such

damages as naturally resulted from failure to deliver. Measure of damages considered.

W. U. Tel. Co. v. John Arwine, Court of Civil Appeals, April 19, 1893 (3 Civ. App. 156).

In an action for damages for the delay of a telegram, the original having been written upon blank paper and not attached to a telegraph blank with the knowledge or consent of the sender, held incompetent as against the sender to prove a regulation of the company requiring all messages to be written or attached to such blanks, and instructions to its agents to the same effect. The stipulation under which defense was sought to be made was that limiting the time within which to present claims.

W. U. Tel. Co. v. Merrill, Court of Civil Appeals, April 27, 1893 (2 S. W. 826).

Verdict for defendant held properly refused, it appearing that failure to transmit a telegram was due to a long standing want of repair of defendant's apparatus.

W. U. Tel. Co. v. Taylor, Court of Civil Appeals, May 3, 1893 (3 Civ. App. 210).

Where the pay for sending a telegram is divided between the company receiving the telegram and a connecting company, the latter is liable to the sender for its delay in delivering the message.

A telegraph company is not bound to deliver a message by special messenger or at extra expense, at a place three miles away from the terminal office and beyond the delivery limit.

Womack v. W. U. Tel. Co., Court of Civil Appeals, May 10, 1893 (23 S. W. 417).

Damages for mental suffering of parents, for delay of telegram relating to lost child, held proper.

Heard v. W. U. Tel. Co., Court of Civil Appeals, May 24, 1893 (23 S. W. 534).

The sender of a telegram cannot recover damages for mental anguish caused by delay, in a case where the company could not reasonably be presumed to have contemplated such a result.

W. U. Tel. Co. v. Lyman, Court of Civil Appeals, May 31, 1893 (3 Civ. App. 460).

The addressee of a telegram may recover from a connecting line of telegraph which has accepted a message in the usual course of business for delay of a telegram.

The repetition of a telegram is not a guard against delay. Therefore the fact that the message was not repeated, though written on a blank limiting liability in case of non-repetition, will not avail as a defense.

W. U. Tel. Co. v. McLeod, Court of Civil Appeals, June 14, 1893 (23 S. W. 983).

Action for damages for delay of telegram announcing illness of a sister of the addressee. Held that telegram in this form, "Miss Carrie sick. She wants you. Come to-morrow," was sufficient to indicate the importance of the message.

The jury can estimate damages for mental suffering from their own knowledge and experience, without evidence.

W. U. Tel. Co. v. Hinkle, Court of Civil Appeals, June 21, 1893 (3 Civ. App. 518).

The message not being delivered to the company upon a printed blank, there was no error in refusing to charge the jury as to the contents of the blank usually furnished by the company.

W. U. Tel. Co. v. Housewright, Court of Civil Appeals, Nov. 1, 1893 (5 Civ. App. 1).

Question of submission of facts to jury.

W. U. Tel. Co. v. Evans, Court of Civil Appeals, Nov. 16, 1893 (5 Civ. App. 55).

An agreement by the agent at the terminal office, to deliver a message expected by the addressee to a person residing near the office who would take it to the addressee, held to be within the scope of the agent's authority and a part of the contract for transmission and delivery.

In an action for damages for delay of a telegram because of which the wife of the addressee was prevented from reaching her son before his death, the injury to the feelings of the wife was a proper element of damages.

W. U. Tel. Co. v. Karr, Court of Civil Appeals, Nov. 23, 1893 (5 Civ. App. 60).

A telegraph company cannot be charged with negligence due to the employment of incompetent agents in absence of proof that said agents had been negligent at any other time.

Commencement of an action is equivalent to the service of written notice of claim, for the purpose of the sixty days' clause.

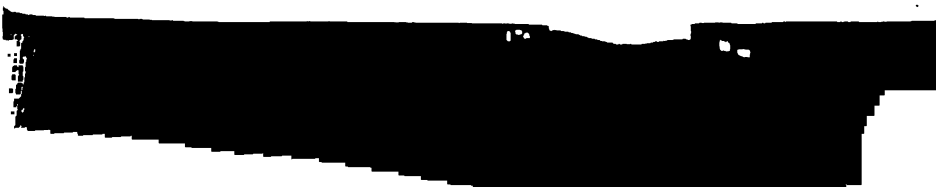
Questions of evidence and damages.

Mitchell v. W. U. Tel. Co., Court of Civil Appeals, Dec. 12, 1893 (5 Civ. App. 437).

Telegram in language, "Water is getting low. Come out," sent by his agent to the owner of a cattle ranch, gave sufficient notice to the company of its importance and urgency.

W. U. Tel. Co. v. Clark, Court of Civil Appeals, Jan. 24, 1894 (25 S. W. 390).

Delay by a telegraph company for twenty-seven hours or more to transmit and deliver a telegram to a wife calling her to attend her sick husband, the terminal point being eighty miles from the sending office, shows negligence.



Wertz v. Telegraph Co.

W. U. Tel. Co. v. Zane, Court of Civil Appeals, March 6, 1894 (6 Civ. App. 335).

Telegram in the language, "Jerry is in hospital at Sedora dangerously sick with pneumonia," is sufficient to notify the company of relationship between the addressee and the person named as being ill.

In an action by the addressee for damages due to the delay of such telegram, the company cannot excuse itself by the fact that by error of the sender the wrong place was mentioned as that at which addressee's brother was sick.

\$1,950 held not excessive damages for mental distress caused the addressee of a telegram by twenty-four hours' delay of the same as the result of which the addressee's brother died before he could reach him.

Pruett v. W. U. Tel. Co., Court of Civil Appeals, March 8, 1894 (25 S. W. 734).

Question of damages.

W. U. Tel. Co. v. McMillan, Court of Civil Appeals, March 14, 1894 (35 S. W. 831).

Questions of evidence.

Martin v. W. U. Tel. Co., Court of Civil Appeals, March 23, 1894 (1 Civ. App. 143).

The statute, R. S. art. 3203, which provides that actions for personal injuries must be brought within a year, includes actions for damages for mental injuries due to non-delivery of telegrams.

A. W. WERTZ, Respondent, v. WESTERN UNION TELEGRAPH COMPANY, Appellant.

Utah Supreme Court, April 15, 1892.

(3 Utah, 499.)

ERROR IN TELEGRAM.—LIMITING LIABILITY.

A telegraph company cannot by stipulations in its blanks free itself from liability for its own negligence or that of its employees. Applied in case of unrepeatd message.

Wertz v. W. U. Tel. Co., vol. 3, p. 808, cited and followed.

APPEAL by defendant below from judgment of District Court, Weber county. Facts stated in opinion.



Bonns & Rogers (George H. Fearons, of counsel), for the appellant.

Smith & Smith, for the respondent.

'ZANE, C. J.: This is an appeal by the defendant from a judgment upon a verdict for \$1,500 for the plaintiff. It appears from the evidence in the record that the plaintiff delivered to the agent of defendant at Ogden City, Utah, the following message:

I will give one thousand cash, bal. six months.

and that he directed the agent in writing to transmit the same to George W. Storer, at Eagle Rock, Idaho, and that he paid at the same time therefor fifty cents. It also appears that the message sent was as follows:

I will give one hundred cases, balo. six months;

And the weight of the evidence shows that the plaintiff lost in profits as much as \$1,500 in consequence of the failure to forward the message as requested, and that this failure was in consequence of the negligence of the defendant's agent. The message was written on a form upon which was printed the following provision: "It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeatd message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending same." The message was not repeated, nor did the plaintiff request it. In view of the foregoing provision, and of the fact that the plaintiff did not have the message repeated, appellant's counsel claim that defendant was not liable to pay more than the 50 cents received for transmission. When this case was before us at the June term, 1891, the point now made was decided. This court then said: "Public policy forbids contracts by telegraph

companies exempting them from the consequences to their employers from the negligence of their agents in transmitting messages." *Wertz v. Telegraph Co.*, 7 Utah, 446 (27 Pac. Rep. 172). Counsel for appellant rely upon *York Co. v. Central Railroad*, 3 Wall. 107; *Hart v. Railroad Co.*, 112 U. S. 331 (5 Sup. Ct. Rep. 151); and *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397 (9 Sup. Ct. Rep. 469). The first of these cases holds that common carriers cannot stipulate against losses from their own negligence or misconduct. The other two cases hold that the shipper and common carrier may agree upon the value of goods shipped by a contract fairly made, and that such price would be the limit of the carrier's liability in case of loss or damage from his negligence or misconduct. Under such a contract the shipper should not deny that a price he has agreed upon is sufficient, and by such a contract the carrier may protect himself from extravagant and fanciful valuations, and fix his compensation with reference to his liability, as well as with respect to the cost of transportation. These cases do not hold that a common carrier can contract against losses from his own negligence. Though the evidence in this case shows that the plaintiff lost \$1,500 from defendant's negligence, the stipulation relied upon limits its liability to fifty cents. In holding the stipulation in question valid, the court would decide that a common carrier may contract against loss from his own negligence. We find no error in this record. The judgment of the lower court is affirmed.

BLACKBURN, J., and BARTON, J., concurred.

NOTE.—See note, vol. 8, p. 810.

WESTERN UNION TELEGRAPH COMPANY V. J. O. TYLER.*Virginia Supreme Court, Nov. 16, 1893.*

(90 Va. 297.)

TELEGRAPH COMPANY.—STATUTORY PENALTY.—INTERSTATE COMMERCE.

Under Virginia Code, section 1292, which requires prompt delivery of telegrams and prescribes a forfeiture of \$100 to the sender or addressee, for failure to deliver promptly, held :

First. That an action to enforce the forfeiture need not be brought in the name of the Commonwealth.

Second. That the statute is not repugnant to the interstate commerce provisions of the Federal Constitution, so far as it applies to a telegram to be delivered within the State of Virginia.

Cases of this series cited in opinion: *Tel. Co. v. Texas*, vol. 1, p. 373; *W. U. Tel. Co. v. Pendleton*, vol. 1, p. 633; *Leloup v. Port of Mobile*, vol. 2, p. 79.

APPEAL by defendant from judgment of Circuit Court, Allegheny county.

Facts stated in opinion.

Stiles & Holladay, for plaintiff in error.

Benj. Haden, for defendant in error.

LEWIS, P., delivered the opinion of the court. This was an action against the Western Union Telegraph Company, to recover a statutory penalty of one hundred dollars for the failure of the company to deliver as promptly as practicable a certain dispatch sent from Asheville, North Carolina, to the plaintiff, at Clifton Forge, in this State. Section 1292 of the Code, under which the action was brought, reads as follows :

It shall be the duty of every telegraph or telephone company, upon the arrival of a dispatch at the point to which it is to be transmitted by

said company, to deliver it promptly to the person where the regulations of the company require such it promptly as directed, where the same is to be failure to deliver or forward a dispatch as prom company shall forfeit one hundred dollars to the patch, or to the person to whom it was addressed.

It is admitted that the dispatch in queered as promptly as practicable, but the less, denies the plaintiff's right to recover viz. : (1) Because the action, if maintained to have been in the name of the company because section 1282 of the Code is repugnant of the Constitution of the United States Congress the power to regulate commerce States.

As to the first point, little need be said the Code provides that "where any statute unless it be otherwise expressly provided consistent with the manifest intention of the it shall be to the commonwealth," etc. ; it is provided that "wherever the words of this chapter, it shall be construed to include forfeiture, penalty, and amercement." Upon which the company relies have no case like the present. Section 1282, which action in a case of this sort, expressly provides forfeiture shall be "to the person sending the person to whom it was addressed ;" therefore be manifestly inconsistent with the Legislature to hold that the commonwealth in the penalty sought to be recovered is or that the action is not properly in plaintiff.

The next question, then, is whether as it relates to a case like the present,

That the power of Congress to regulate the States is unqualified and supreme,
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was so decided in the great case of *Gibbons v. Ogden*, 9 Wheat. 1, and the subsequent decisions to the same effect are very numerous. It must also be conceded that telegraphic communication, like the transportation of passengers and merchandise, is commerce, and that such communication, when had between different States, is interstate commerce. In *Telegraph Co. v. Texas*, 105 U. S. 460, it was distinctly decided that a telegraph company occupies the same relation to commerce, as a carrier of messages, that a railroad company does as a carrier of goods; that both companies are instruments of commerce, and that their business is commerce itself. See, also, *W. U. Tel. Co. v. Pendleton*, 122 U. S. 347; *Leloup v. Port of Mobile*, 127 id. 640. Nor is it denied that those subjects of commerce which are national in their nature, admitting of only one uniform system or plan of regulation, such as the transportation of commodities or the transmission of messages between different States, are subject to the exclusive control of Congress, and consequently that any regulation thereof by State legislation, whether Congress has legislated on the subject or not, is void. *Cooley v. Board of Port Wardens*, 12 How. 299; *Welton v. State of Missouri*, 91 U. S. 275; *Henderson v. Mayor, etc.*, 92 id. 259; *Gloucester Ferry Co. v. Pennsylvania*, 114 id. 196; *Robbins v. Shelby Taxing District*, 120 id. 489; *Leisy v. Hardin*, 135 id. 100; *Lehigh Valley Railroad Co. v. Pennsylvania*, 145 id. 192; *W. U. Tel. Co. v. Texas*, 105 id. 460; *Leloup v. Port of Mobile*, 127 id. 640.

These principles were acted on by this court in *N. & W. R. R. Co. v. Commonwealth*, 88 Va. 95, and we do not understand them to be controverted in the present case.

But does the statute, the validity of which is here drawn in question, amount to a regulation of commerce? In *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, a statute of Indiana was held to be repugnant to the commerce clause of the Constitution, so far as it attempted to regulate the delivery of dispatches sent from that State into other States, because, as the court said, conflicting

legislation would inevitably follow with reference to telegraphic communications between different States, if each State was vested with power to control them beyond its own limits.

But that is not the question arising in the present case, nor does the reasoning in that case apply to this. This is an action for the failure to deliver in this State a dispatch sent from another State and deliverable here, under a statute of this State. There is no question as to the extra territorial operation of the statute, and it will be time enough to decide that question when it arises.

It has been argued with much earnestness that the statute amounts to a regulation of interstate commerce, but we are unable to come to that conclusion. If it can be said to affect commerce at all, it does so only remotely or incidentally. It prescribes no new rule, and imposes no additional duty, and, so far as the delivery of telegrams is concerned, it simply prescribes a penalty for a failure to deliver where the regulations of the company itself require such delivery. That it would be competent, moreover, for the State to afford redress through her courts, according to the common law, for the negligent failure of a telegraph company to deliver a dispatch sent from another State, is unquestionable; and, if this may be done, it is equally competent for the State to seek by legislation, in advance, to prevent such violation of duty.

We think the case is within the principle of the decision in *Sherlock v. Alling*, 93 U. S. 99, namely, that "the legislation of a State, not directed against commerce, or any of its regulations, but relating to *the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce*, is of obligatory force upon citizen, within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit."

This principle was applied and amplified in *Smith v. Alabama*, 124 U. S. 465; and again in *Nashville, etc., Ry. Co. v. Alabama*, 128 id. 96.

In the *Smith case*, the question was whether a statute of Alabama making it unlawful for any locomotive engineer to drive or operate any train of cars without having been first examined and licensed was in contravention of the commercial power of Congress, so far as it applied to engineers employed on interstate trains, and it was held that it was not. After a full consideration of the case, the conclusions announced were (1) that the statute was not, in its nature, a regulation of commerce ; (2) that it was properly an act of legislation within the reserved power of the State to regulate the relative rights and duties of persons within the State so as to secure safety of persons and property ; and (3) that so far as it affected interstate commerce, it did so only indirectly, and not so as to burden or impede such commerce.

In the course of the opinion, it was said, by way of illustration, that a common carrier, although engaged in interstate commerce, is liable according to the local laws of the particular State in which he may be guilty of any nonfeasance or misfeasance, as, for example, for *his failure to deliver goods at the proper time and place*, or for injuries to passengers, caused by his negligence, and that in neither case would it be a defense that the law giving the right of redress was void as being an unconstitutional regulation of commerce by the State.

These views were repeated in the case in 128 U. S., above cited, where a statute of Alabama requiring the examination of certain railway employes with respect to their powers of vision was sustained, and held not to be a regulation of commerce. The provisions of the statute, like those of the statute upheld in the *Smith case*, were held to be but parts of that local law which governs the relation between carriers of passengers and merchandise, and the public who employ them, which, as respects interstate commerce, are not displaced until they come in conflict with an express enactment of Congress. And, after quoting from the opinion in the *Smith case*, it was added that what the State

may punish or afford redress for, when done, it may seek, by proper precautions in advance, to prevent.

In *Sherlock v. Alling*, *supra*, the main point was whether a State statute giving a right of action to the personal representative of a deceased person, whose death was caused by the wrongful act or omission of another, could be constitutionally applied to the case of a loss of life by a collision between steamboats navigating the Ohio river, engaged in interstate commerce. The defendant's contention was that the statute enlarged the liabilities of parties for such torts, and, if applied to marine torts, would constitute a new burden on commerce. But this view was rejected, and the statute was held a valid addition to and amendment of the general law of the State, which did not, within the meaning of the Constitution, place a burden on commerce, or amount to a regulation thereof; and, referring to previous decisions relied on by the defendant, it was said that the legislation adjudged invalid in those cases "created, in the way of tax, license, or condition, a direct burden on commerce, or in some way directly interfered with its freedom."

Tested by these principles, section 1292 of the Code is not open to the objection that has been urged against it. It is not, in a legal sense, a burden upon, or a regulation of, commerce, nor does it conflict with any act of Congress. It is simply, as was the legislation involved in the cases just mentioned, an amendment or enlargement of the local law, which is subject to modification by the Legislature, and which regulates the relative rights and duties of telegraph companies, and persons doing business with them, in this State. It is, of course, competent for Congress, in the exercise of its plenary power in the matter, to prescribe specific regulations touching foreign or interstate commerce, which regulations would supersede all conflicting local law which, even indirectly, affects such commerce. But, until some such action is taken by Congress, we are obliged to hold that section 1292 is a valid enactment.

The following extract from the opinion in *Smith v. Ala-*

bama, is, *mutatis mutandis*, no less applicable to this case than to that. There it was said :

“ But for the provisions on the subject found in the local law of each State, there would be no legal obligation on the part of the carrier, whether *ex contractu* or *ex delicto*, to those who employ him ; or, if the local law is held not to apply where the carrier is engaged in foreign or interstate commerce, then, in the absence of laws passed by Congress, or presumed to be adopted by it, there can be no rule of decision based upon rights and duties supposed to grow out of the relation of such carriers to the public or to individuals. In other words, if the law of the particular State does not govern that relation, and prescribe the rights and duties which it implies, then there is, and can be, no law that does, until Congress expressly supplies it, or is held by implication to have supplied it, in cases within its jurisdiction over foreign and interstate commerce. The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the State law, which, until displaced, covers the subject.”

The result of these views is that the judgment complained of must be affirmed.

JUDGMENT AFFIRMED.

NOTE.— For other cases in which the interstate commerce provisions of the Federal Constitution have been considered, see INDEX to this and previous volumes of this series, title “ Constitutional Law.”

NOTE.— See note, vol. 3, p. 817.



SUMMERFIELD, Respondent, v. WESTERN UNION TELEGRAPH COMPANY, Appellant.*Wisconsin Supreme Court, June 30, 1894.*

(87 Wis. 1.)

DELAY OF TELEGRAM.—MENTAL INJURY.—WISCONSIN STATUTE.

Mental anguish alone will not warrant a recovery of damages for delay of a telegram.

This is so both at common law and under the Wisconsin statute. Laws 1885, chapter 171.

Cases of this series cited in opinion: (Disapproved): *So Rella v. W. U. Tel. Co.* vol. 1, p. 848. (With approval): *W. U. Tel. Co. v. Rogers*, vol. 1, p. 386; *Connell v. W. U. Tel. Co.*, *ante*, p. 748; *W. U. Tel. Co. v. Wood*, *post*; Merely cited: *Candee v. W. U. Tel. Co.*, vol. 1, p. 99.

STATEMENT of facts by WINSLOW, J.

Action for damages for delay in the delivery of a telegram. Plaintiff resided on a farm about ten miles from the village of Iron River, Wis. His mother lived at Lisbon, N. D., with plaintiff's brother, J. W. Summerfield. Defendant had an office at each of these places. October 28, 1892, J. W. Summerfield left at defendant's office at Lisbon a message addressed to plaintiff, care of Burt Clark, Iron River, reading as follows:

"Mother is dying. Come immediately.

J. W. SUMMERFIELD."

The fees for the transmission of the message were paid, but the evidence tended to show that the message was negligently delayed, and was not delivered to Clark until October 28, 1892, and plaintiff did not receive it until after noon of that day. Plaintiff's mother died on the 26th day of October. Plaintiff claimed that he would have gone to his mother's bedside had he received the telegram

in due time, and that, by reason of his failing to receive the message until after his mother's death, he was deeply "mortified, grieved, hurt, and shocked, and suffered intense anguish of body and mind, and was thereby thrown into a state of nervous excitement and tremor, which rendered him sick, and impaired his health and strength, and that he still suffers from the effect of the same."

Upon the trial, objection was made to the reception of any evidence under the complaint, because it did not state facts sufficient to constitute a cause of action, which objection was overruled, and exception was taken.


The court charged the jury, among other things, as follows: "If you find that the message, in the exercise of ordinary diligence, considering all the circumstances of the case, was unreasonably delayed, and that if it had been delivered with reasonable promptness, the plaintiff could and would have responded thereto and reached his mother before her death, and that plaintiff suffered mental pain from a sense of disappointment, sorrow, chagrin, or grief at being deprived of being at his mother's death-bed, your verdict should be for the plaintiff in such sum as will fairly compensate him for his mental suffering and damages, if any, to his nervous system, caused by the shock of such mental suffering."

A verdict for the plaintiff for \$652.50 was rendered, and from judgment thereon defendant appealed.

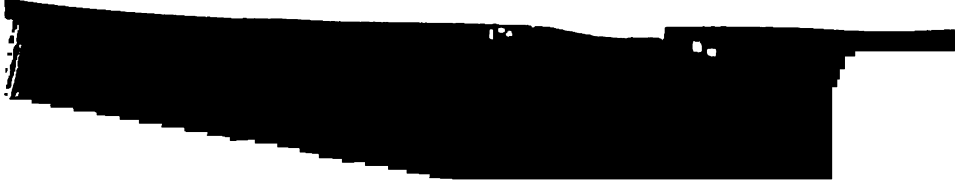
Catlin & Butler, Carl C. Pope, La Follette, Harper, Roe & Zimmerman, and Geo. H. Fearons, for appellant.

McHugh, and Lyons & McIntosh, for the respondent.

WINSLOW, J.: The exact question presented by the instruction of the court to the jury is whether mental anguish alone, resulting from the negligent non-delivery of a telegram, constitutes an independent basis for the recovery of damages.



At common law it was well settled that mere injury to the feelings or affections did not constitute an independent basis for the recovery of damages. Cooley, Torts, 271; Wood's Mayne, Dam. (1st Amer. ed.) § 54, note 1. It is true that damages for mental suffering have been generally allowed by the courts in certain classes of cases. These classes are well stated by COOPER, J., in his learned opinion in the case of *Western Union Tel. Co. v. Rogers*, 68 Miss. 748, as follows: "(1) Where, by the merely negligent act of the defendant, physical injury has been sustained; and in this class of cases they are compensatory, and the reason given for their allowance is that the one cannot be separated from the other. (2) In actions for breach of the contract of marriage. (3) In cases of wilful wrong, especially those affecting the liberty, character, reputation, personal security, or domestic relations of the injured party." To this latter class belong the actions of malicious prosecution, slander and libel, and seduction, and they contain an element of malice. Subject to the possible exceptions contained in the second and third of the above classes, it is not believed that there was any case,—certainly no well considered case,—prior to the year 1881, which held that mental anguish alone constituted a sufficient basis for the recovery of damages. In that year, however, the Supreme Court of Texas, in *So Relle v. W. U. Tel. Co.*, 55 Tex. 303, decided that mental suffering alone, caused by failure to deliver such a telegram as the one in the present case, was sufficient basis for damages. The principle of this case has been followed with some variations by the same court in many cases since that decision, and its reasoning has been substantially adopted by the courts of last resort in the States of Indiana, Kentucky, Tennessee, North Carolina, and Alabama, in cases which are cited in the briefs of counsel. On the other hand, the doctrine has been vigorously denied by the highest courts in the states of Georgia, Florida, Mississippi, Missouri, Kansas, and Dakota, and by practically the unanimous current of authority in the Federal courts. All of these cases will be



preserved in the report of this case, and the citations need not be repeated here.

The question is substantially a new one in this State, and we are at liberty to adopt that rule which best commends itself to reason and justice. It is true that it has been held by this court, in *Walsh v. C., M. & St. P. R. Co.*, 42 Wis. 32, that in an action upon breach of a contract of carriage, damages were not recoverable for mere mental distress; but, as we regard this action as being in the nature of a tort action founded upon a neglect of the duty which the telegraph company owed to the plaintiff to deliver the telegram seasonably, that decision is not controlling in this case.

The reasoning in favor of the recovery of such damages is, in brief, that a wrong has been committed by defendant which has resulted in injury to the plaintiff as grievous as any bodily injury could be, and that the plaintiff should have a remedy therefor. On the other hand, the argument is that such a doctrine is an innovation upon long-established and well-understood principles of law; that the difficulty of estimating the proper pecuniary compensation for mental distress is so great, its elements so vague, shadowy, and easily simulated, and the new field of litigation thus opened up so vast, that the courts should not establish such a rule.

Regarding, as we do, the Texas rule as a clear innovation upon the law as it previously existed, we shall decline to follow it, and shall adopt the other view, namely, that for mental distress alone, in such a case as the present, damages are not recoverable. The subject has been so fully and ably discussed in opinions very recently delivered that no very extended discussion will be attempted here. We refer specially to the opinions in *Western Union Tel. Co. v. Rogers*, 68 Miss. 748; *Connell v. W. U. Tel. Co.*, 116 Mo. 34; *Western Union Tel. Co. v. Wood*, 57 Fed. Rep. 471. See, also, Judge LURTON's dissenting opinion in *Wadsworth v. W. U. Tel. Co.*, 86 Tenn. 695. In the last-named opinion the following very apt remarks are made:

"The reason why an independent action for such damages cannot and ought not to be sustained is found in the remoteness of such damages, and in the metaphysical character of such an injury, considered apart from physical pain. Such injuries are generally more sentimental than substantial. Depending largely on physical and nervous conditions, the suffering of one under precisely the same circumstances would be no test of the suffering of another. Vague and shadowy, there is no possible standard by which such an injury can be justly compensated, or even approximately measured. Easily simulated and impossible to disprove, it falls within all the objections to speculative damages, which are universally excluded because of their uncertain character."

Another consideration which is, perhaps, of equal importance, consists in the great field for litigation which would be opened by the logical application of such a rule of damages. If a jury must measure the mental suffering occasioned by the failure to deliver this telegram, must they not also measure the vexation and grief arising from a failure to receive an invitation to a ball or a Thanksgiving dinner? Must not the mortification and chagrin caused by the public use of opprobrious language be assuaged by money damages? Must not every wrongful act which causes pain or grief or vexation to another be measured in dollars and cents? Surely, a court should be slow to open so vast a field as this without cogent and over-powering reasons. For ourselves we see no such reasons. We adopt the language of GANTT, P. J., in *Connell v. W. U. Tel. Co.*, *supra*: "We prefer to travel yet awhile *super antiquas vias*. If, in the evolution of society and the law, this innovation should be deemed necessary, the Legislature can be safely trusted to introduce it, with those limitations and safeguards which will be absolutely necessary, judging from the variety of cases that have sprung up since the promulgation of the Texas case."

It was argued that under ch. 171, Laws of 1885, (S. & B.

Ann. Stats., sec. 1770b), damages for injuries to feelings alone might be recovered. This law provides that telegraph companies shall be liable for all damages occasioned by failure or negligence of their operators, servants or employes in receiving, copying, transmitting or delivering dispatches or messages. We cannot regard this statute as creating, or intended to create, in any way, new elements of damage. Whether its purpose was to obviate the difficulties which were held fatal to a recovery in the case of *Candee v. W. U. Tel. Co.*, 34 Wis. 471, or to effect some other object, is not a question which now arises; but it seems clear to us that, had a radical change in the law relating to the kinds of suffering which should furnish a ground of damages been contemplated, the act would have expressed that intention in some unmistakable way. We see nothing in the law to indicate such intention.

Finally, it is said that verdicts for injuries to the feelings alone have been sustained in this court, and the following cases are cited: *Wightman v. C. & N. W. R. Co.*, 73 Wis. 169; *Craker v. C. & N. W. R. Co.*, 36 Wis. 657; *Draper v. Baker*, 61 Wis. 450. Without reviewing these cases in detail, it is sufficient to say that there was in all of them the element of injury or discomfort to the person, resulting either from actual or threatened force, and they cannot be relied upon as precedents for the allowance of damages for mental sufferings alone.

It follows from these views that the instruction excepted to was erroneous.

By the Court.—Judgment reversed, and action remanded for a new trial.

NOTE.—CASSOWAY, J., wrote a dissenting opinion, holding that under the statute damages might be recovered as to mental injury alone.

The following is the head-note to *Duncan v. W. U. Tel. Co.* reported 58 N. W. Rep. 75 (Wisconsin Supreme Court, Feb. 23, 1894):

"A mistake in the transmission of a telegram requesting the services of a veterinary surgeon cannot be deemed the proximate cause of the death of a horse belonging to the sender of the telegram, where the evidence is merely conjectural as to whether the life of the horse might have been saved had a veterinary come at once, pursuant to a correct transmission."

See note, vol. 2, p. 851.

J. O. TYLER v. WESTERN UNION TELEGRAPH COMPANY.

U. S. Circuit Court, W. D. Virginia, March 18, 1893.

(54 Fed. R. 634.)

DELAY OF TELEGRAM.—VIRGINIA TELEGRAPH STATUTE.—MENTAL DISTRESS.

By the common law in Virginia, damages for mental suffering can be allowed only where it is the result of and connected with a physical injury.

Physical suffering resulting from mental distress is too remote to form a basis for damages.

No action for damages for mental distress alone, caused by delay in transmission of a telegram, will lie under sections 1393 and 2900 of the Code of Virginia.

Case of this series cited in opinion: *Western Union Tel. Co. v. Hall*, vol 2, p. 868.

AT law. Action of trespass on the case, for injuries caused by delay in delivery of a telegram. Cause removed by defendant from Circuit Court of Virginia. On demurrer to the declaration.

Statement by PAUL, District Judge: The plaintiff in this case brought his action in the Circuit Court of the State of Virginia for the county of Allegheny on the 18th of January, 1892, and it was thereafter, to wit, on the 7th of June, 1892, removed into this court upon the petition of the defendant company, under the provisions of the act of Congress, approved March 3, 1875, entitled "An act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from the State courts, and for other purposes," as amended by the act of Congress, approved March 3, 1887. The plaintiff alleges that on the 25th day of September, 1891, the defendant company, for and in consideration of the charges then and there paid to said defendant company at Asheville, N. C.,

Tyler v. Telegraph Co.

by one J. W. Morgan, undertook and faithfully promised that it would carry, transmit, and convey from Asheville, N. C., to the plaintiff, at Clifton Forge, Va., the following message, to wit:

ASHEVILLE, N. C., 25.


To J. O. Tyler, City: Fred is badly hurt. Come at once.

J. W. MORGAN.

That said message was sent to plaintiff at Clifton Forge, Va. That it was afterwards, to wit, on September 25th, at 5.30 P. M., 1891, received duly by said defendant company at Clifton Forge, Va. That plaintiff was then and there and afterwards a citizen and resident of Clifton Forge, Va., and that he was in that place on the said 25th of September, 1891. That said message showed on its face the importance of its being promptly delivered by said defendant company to the plaintiff, but that the defendant company did not convey, transmit, and deliver the said message to the plaintiff promptly, as it was the duty of the defendant company to have done, but wrongfully held, kept, and retained possession of the same until late in the following day, to wit, September 26, 1891; whereby plaintiff was prevented from seeing his sick son, waiting upon him, and from furnishing him special medical attention, and employing learned surgeons and physicians, by whose attentions the life of his son might have been saved, and that he was prevented from seeing his son alive, whereby, the plaintiff alleges, he has suffered great agony of mind, and has been unfitted for attending to his business as he was theretofore able to do, has been impaired in his health and strength, and has suffered in mind and body, to the damage of plaintiff \$4,900. The defendant in this case demurs to the declaration on the ground that an action for damages cannot be maintained where it is based on mental suffering alone.

Benjamin Haden, for plaintiff.

Robert Stiles, for defendant.



PAUL, District Judge (after stating the case as above): The contention of the defendant is that damages for mental suffering can only be allowed where it is the result of and connected with a physical injury. This is clearly the doctrine of the common law, and, so far as the court is informed, there has been no departure from it in Virginia. The court has been cited to a number of decisions in other States which are an innovation on this well established principle, but a careful reading of these cases will show that the courts rendering the decisions were compelled, in most of the cases, to seek other grounds for their justification than the naked fact of mental suffering from the negligence of the defendant. All of the cases cited were actions against the defendant in this case. The result of this class of decisions is that, if the message was such as to put the telegraph company on its guard as to its great importance, and thus bring home to its notice that its failure to promptly deliver the message would probably result in great grief and mental suffering to the sender or the sendee of the message, then the action can be maintained for the mental suffering occasioned by the negligent failure of the company to deliver the message promptly. The court deems it unnecessary to enter into a critical examination of these cases and the reasoning on which their conclusions rest. The doctrine has not the sanction of the highest State Court in Virginia. The question has never been directly presented to the Supreme Court of the United States, but the question as to when mental suffering can be considered as an element in ascertaining the damages to which a plaintiff is entitled was considered in *Gilmer v. Kennon*, 131 U. S. 22 (9 Sup. Ct. Rep. 696), and in *Telegraph Co. v. Hall*, 124 U. S. 444 (8 Sup. Ct. Rep. 577). In these cases it was held that damages may be allowed for mental suffering when it is the result of and flows from physical injury. But this question has recently been passed upon and settled, so far as this court is concerned, by a decision of the Circuit Court of Appeals of the United States for the fourth judicial circuit, in *Wilcox v. Railroad Co.*, 52 Fed.

penalty for their failure to perform said duties, and section 2900 is as follows :

Section 2900. Any person injured by the violation of any statute may recover from the offender such damages as he may have sustained by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of such damages.

It is very evident that the purpose of section 2900 was merely to preserve to an injured person the right to maintain his action for the injury he may have received by reason of the wrongdoing of another, and to prevent the wrongdoer from setting up the defense that he had paid the penalty of his wrongdoing under a penal statute. It can not be supposed that in enacting section 2900 the Legislature had the remotest idea of creating any new ground for bringing an action for damages. It was only intended to keep the subject just where it was under the common law before the enactment of section 1292, prescribing the duties of telegraph and telephone companies, and fixing a penalty for their failure to perform said duties. The language of the statute is : " Any person injured by the violation of any statute," etc., and we are brought back face to face with the question, what constitutes in law the injury referred to by the statute? Certainly, as we have already shown above, it cannot be " disappointment and mental suffering only, there being no allegation of any other damage." And counsel for plaintiff, as if anticipating this, has alleged in his declaration and argued that there has been physical suffering and injury resulting from the mental anxiety of the plaintiff, and undertakes in his argument so to weave the two together as to give the injuries the nature necessary for the maintaining of this action. But the court thinks the sickening of the body in consequence of anxiety of mind is too remote a result of the negligence complained of to give the case the elements which it should possess in order to maintain the action. As has been said by Lord CAMPBELL, quoted by Wharton on Negligence (section 78) :

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"If the wrong and the legal damage are not known by common experience to be usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action."

The demurrer is sustained.

NOTE.—This case is cited in *Matthew Connell v. W. U. Tel. Co.* ante p. 748.

HENRY J. KESTER v. WESTERN UNION TELEGRAPH COMPANY.

Circuit Court, N. D. Ohio, March 27, 1892.

(55 Fed. R. 603.)

DELAY OF TELEGRAM.— DAMAGES.— MENTAL DISTRESS.

Mental anguish alone constitutes no basis for damages in an action growing out of negligent failure to promptly transmit a telegram.

Cases of this series cited with disapproval: *Stuart v. W. U. Tel. Co.*, vol. 2, p. 771; *Gulf, &c., Railway Co. v. Miller*, vol. 2, p. 781; *W. U. Tel. Co. v. Cooper*, vol. 2, p. 795; *W. U. Tel. Co. v. Broesche*, vol. 2, p. 815; *W. U. Tel. Co. v. Simpson*, vol. 2, p. 819; *W. U. Tel. Co. v. Adams*, vol. 3, p. 768; *Wadsworth v. W. U. Tel. Co.*, vol. 2, p. 736; *Reese v. W. U. Tel. Co.*, vol. 3, p. 840; *W. U. Tel. Co. v. Henderson*, vol. 3, p. 570; *Thompson v. W. U. Tel. Co.*, vol. 3, p. 750; *Chapman v. W. U. Tel. Co.*, vol. 3, p. 670; *Young v. W. U. Tel. Co.*, vol. 3, p. 784; *So Belle v. W. U. Tel. Co.*, vol. 1, p. 848.

Cited with approval: *Chapman v. W. U. Tel. Co.*, vol. 4, p. ; *Crawson v. W. U. Tel. Co.*, vol. 3, p. 820; *Chase v. W. U. Tel. Co.*, vol. 3, p. 817; *West v. W. U. Tel. Co.*, vol. 2, p. 588; *Russell v. W. U. Tel. Co.*, vol. 1, p. 653; *W. U. Tel. Co. v. Rogers*, vol. 3, p. 686, note.

DECISION of demurrer to complaint. Facts stated in opinion

Tyler & Tyler, for plaintiff.

Henry Newbegin, for defendant.

TAFT, Circuit Judge.: This is an action for damages for the negligence of the defendant in transmitting to plaintiff a telegraphic message, as follows:

BLOOMVILLE, JAN. 4, 1892.

H. J. Kester, Holgate, O. Father dead. Send word to Brinkman. Funeral Wednesday, eleven A. M.

J. F. KESTER.

J. F. Kester paid the usual tolls for the transmission of the message, which was delayed four days, instead of reaching the plaintiff the same day, as it should have done. No damages are alleged except mental anguish arising from the fact that the plaintiff was prevented by the delay in the message from attending his father's funeral, and consoling his mother in her bereavement. The defendant demurs to the plaintiff's petition, on the ground that it does not state facts sufficient to constitute a cause of action.

The question presented is whether mental anguish alone constitutes any basis for damages in such a case. The authorities are in conflict. Until 1880 there was no authority of any respectability whatever sustaining a cause of action for damages based upon mental anguish only. In 1880 a decision was made by the Supreme Court of Texas in a delayed telegram case, sustaining the view that, though the injury sustained was solely mental pain, damages might be recovered. That case has not been consistently followed in Texas, and yet it is true that by the decisions of the Supreme Court of that State, as well as by those of the States of Indiana, Alabama, Kentucky, Tennessee, and North Carolina, damages may be recovered in a case like the one at bar. *Stuart v. Telegraph Co.*, 66 Tex. 580, 18 S. W. Rep. 351; *Railway Co. v. Wilson*, 69 Tex. 739 (7 S. W. Rep. 653); *Telegraph Co. v. Cooper*, 71 Tex. 507

(9 S. W. Rep. 598); *Telegraph Co. v. Broesche*, 72 Tex. 654 (10 S. W. Rep. 734); *Same v. Simpson*, 73 Tex. 423 (11 S. W. Rep. 385); *Same v. Adams*, 75 Tex. 531 (12 S. W. Rep. 857); *Wadsworth v. Telegraph Co.*, 86 Tenn. 695 (8 S. W. Rep. 574); *Reese v. Same*, 123 Ind. 294 (24 N. E. Rep. 163); *Beasley v. Same*, 39 Fed. Rep. 181; *Telegraph Co. v. Henderson*, 89 Ala. 510 (7 South. Rep. 419); *Thompson v. Telegraph Co.*, 106 N. C. 549 (11 S. E. Rep. 269); *Chapman v. Same* (Ky.), 13 S. W. Rep. 880; *Young v. Same*, 107 N. C. 370 (11 S. E. Rep. 1044); *Thompson v. Same*, 107 N. C. 449 (12 S. E. Rep. 427); *Thomp. Elect.*, § 378, and cases cited.

This line of authorities depends altogether on the case of *So Relle v. Telegraph Co.*, 55 Tex. 308, which was decided in 1881. No authority can be found to support the contention previous to that case, and that is founded on a mere suggestion of a text writer on the subject of negligence. The doctrine was vigorously attacked in an able dissenting opinion in the case of *Wadsworth v. Telegraph Co.*, 86 Tenn. 695 (8 S. W. Rep. 574), by Chief Justice LURTON, of the Supreme Court of Tennessee. We think the rule first laid down by the Texas court is a departure from the sound and safe principles of the common law. The difficulty of estimating a pecuniary compensation for mental anguish is itself a sufficient reason for the common-law rule in preventing a recovery for mental anguish in actions for simple negligence or breach of contract. The amount of litigation which would grow out of the adoption of such a rule would be intolerable. The measure of damages to be adopted would be so indefinite and so undefinable as to subject the defendant in such cases to the possibility of great oppression. The difficulty of securing evidence as to the actual mental suffering is another reason why it could not be made the sole basis of an action. It has generally been allowed to be considered as an element in fixing damages in two classes of cases. The first is where there has been a physical injury and physical suffering of such a character that it would be dif-

difficult to distinguish between the mental and physical suffering; and the second class of cases is where the injury complained of contains an element of malice, and the damages for mental suffering are left to the jury to be fixed as a kind of punitive or exemplary damages. This case of course comes under neither head. In slander and libel, the action cannot be founded solely on mental suffering. There must be some other damage alleged before a cause of action is stated.

Without a full examination of the authorities, it is sufficient to say that the Federal authorities and a large number of others sustain the view here taken. *Wilcox v. Railroad Co.*, (4th Circuit,) 52 Fed. Rep. 264 (3 C. C. A. 73); *Chapman v. Telegraph Co.*, 15 S. E. Rep. 901 (decision by the Supreme Court of Georgia, LUMPKIN, J.); *Crawson v. Telegraph Co.*, 47 Fed. Rep. 544; *Chase v. Telegraph Co.*, 44 Fed. Rep. 554, where all the authorities are cited; *West v. Telegraph Co.*, 39 Kan. 93 (17 Pac. Rep. 807); *Russell v. Same*, 3 Dak. 315 (19 N. W. Rep. 408); *Telegraph Co. v. Rogers*, 68 Miss. 748 (9 South. Rep. 823); *Lynch v. Knight*, 9 H. L. Cas. 577; *Commissioners v. Coultas*, L. R. 13 App. Cas. 222.

The demurrer to the petition will be sustained, and if no amendment can be made introducing an element of actual pecuniary loss, which from the statements of the petition seems unlikely, judgment will be entered upon this demurrer.

NOTE.—This case is cited in *Matthew Consell v. W. U. Tel. Co.*, ante, p. 742.

WESTERN UNION TELEGRAPH COMPANY V. A. WOOD.

U. S. Circuit Court of Appeals, Fifth Circuit, May 30, 1892.

(57 Fed. R. 471.)

FAILURE TO DELIVER TELEGRAM.—RIGHTS OF ADDRESSEE.—MENTAL DISTRESS.—EFFECT OF STATE DECISIONS.

The addressee cannot recover damages for default of the company as to a telegram for the transmission of which he did not contract, nor had the company knowledge that the contract was for his benefit.

Damages for mental suffering caused by failure to transmit a telegram announcing the illness of a relative, cannot, in case of mere negligence, be awarded against a telegraph company.

In absence of statute, Federal courts are not bound by the decisions of State courts as to the liability of telegraph companies for error, delay or default in transmission or delivery.

Cases of this series cited in opinion: *Gulf, &c. Ry. Co. v. Isaac Levy*, vol. 1, p. 586; *W. U. Tel. Co. v. Brosche*, vol. 2, p. 815; *W. U. Tel. Co. v. Young*, vol. 3, p. 777; *W. U. Tel. Co. v. Adams*, vol. 3, p. 768; *W. U. Tel. Co. v. Longwill*, vol. 2, p. 688; *W. U. Tel. Co. v. Allen*, vol. 2, p. 685; *W. U. Tel. Co. v. DuBois*, vol. 2, p. 499; *Young v. W. U. Tel. Co.*, vol. 3, p. 784; *Chapman v. W. U. Tel. Co.*, vol. 3, p. 670; *Wadsworth v. W. U. Tel. Co.*, vol. 2, p. 786; *Reese v. W. U. Tel. Co.*, vol. 3, p. 640; *W. U. Tel. Co. v. Jones*, vol. 3, p. 794; *W. U. Tel. Co. v. Edsall*, vol. 2, p. 828; *W. U. Tel. Co. v. Rosentreter*, vol. 3, p. 789; *W. U. Tel. Co. v. Nations*, vol. 3, p. 799; *Tel. Co. v. Texas*, vol. 1, p. 378; *So Relle v. W. U. Tel. Co.*, vol. 1, p. 848; *Russell v. W. U. Tel. Co.*, vol. 1, p. 653; *West v. W. U. Tel. Co.*, vol. 2, p. 588; *Chase v. W. U. Tel. Co.*, vol. 3, p. 817; *Crawson v. W. U. Tel. Co.*, vol. 3, p. 820; *Tyler v. W. U. Tel. Co.*, vol. 4, p. 829; *W. U. Tel. Co. v. Cooper*, vol. 2, p. 795; *W. U. Tel. Co. v. Brown*, vol. 2, p. 812.

IN error to the Circuit Court of the United States for the Northern District of Texas.

Statement by PARDEE, Circuit Judge:

The defendant in error brought his action against the plaintiff in error in the District Court of Coryell county, State of Texas, and caused summons to be issued, returnable to the January term, 1892, of said court. On the peti-

tion of the plaintiff in error the case was duly removed to the Circuit Court of the United States for the Northern District of Texas. After such removal the plaintiff, defendant in error here, filed his first amended original petition, in lieu of all other petitions, upon which the case was tried and which reads as follows: "Now comes A. Wood, plaintiff in above-styled cause, complaining of defendant, the Western Union Telegraph Company, and files this his first amended original petition, in lieu of his original petition herein, and for amendment shows the court that plaintiff resides in Coryell county, Tex.; that the defendant is a body corporate, duly incorporated, and has an office and agent, A. W. Lyman, in Gatesville, Coryell county, Tex.; that said defendant is doing business in the State of Texas, and engaged in transmitting messages for hire; that the said defendant corporation now owns and operates, and did so own and operate a telegraph line, on the 22nd day of October, 1891, from the town of McGregor, in the county of McLennan, State of Texas, to the town of Gatesville, in Coryell county, Tex.; that a brother of the plaintiff, G. W. Wood, resided in Jefferson, Marion county, Tex., at which point the defendant was also operating its said line of telegraph; that about said date the said brother, G. W. Wood, became very ill, and desiring the presence of plaintiff, to comfort him in his last illness, and to settle important business matters, he procured a telegram to be sent to his son, John A. Wood, who resided in McGregor, McLennan county, Tex., requesting the presence of his said son and plaintiff's nephew, and requesting said son to notify plaintiff of his said illness; that on the 22nd day of October, 1891, the said John A. Wood, in response to said telegram, sent him by his father's request, and as the agent and acting for plaintiff, delivered to the agent of defendant, in McGregor, Tex., a telegram substantially as follows:

To A. Wood, Gatesville, Texas: Received telegram. Pa is very low. Asked to wire you.

JOHN A. WOOD.

days before his death ; that, had said telegram been delivered at any time before said hour on the day after it was received, he could and would have been with his said brother at least one day before his death. Plaintiff further shows that at the time of the death of said G. W. Wood there existed certain business transactions, of great importance and value, between him and plaintiff, which were in an unsettled condition, and by his death the same remains to be settled with his heirs, which will occasion much expense, time, and trouble, to plaintiff's great damage, and which have caused plaintiff distress and worry of mind ; that by reason of defendant's wilful and careless negligence this plaintiff was deprived of the privilege of being at the bedside of his brother in his last illness, and comforting him in his death, and from attending his funeral and burial, and by his presence comforting and consoling the bereaved family of his deceased brother, to his great distress and mental agony and pain. And plaintiff says, by reason of all of said allegations herein set out, he has been damaged by said defendant in the full sum of twenty-five hundred dollars actual damages, and on account of defendant's wilful conduct and gross negligence, in failing to deliver said telegram, he has been damaged in the further sum of twenty-five hundred dollars as exemplary damages. Wherefore, plaintiff prays for judgment for said sum of twenty-five hundred dollars actual damages, and twenty-five hundred dollars exemplary damages, and costs of suit ; and he prays such further relief, both legal and equitable, general and special, as he may be entitled to, and in duty bound will ever pray," etc.

To this petition the plaintiff in error, defendant in the court below, filed its first amended original answer in lieu of all other pleas theretofore filed in the case, and therein, as permitted by the practice in the State of Texas, first demurred generally to the plaintiff's petition as insufficient in law. then specially demurred :

(1) That in so far as plaintiff seeks to recover damages for alleged failure to arrange business matters, and for

alleged mental suffering and distress, his petition is insufficient, for the reason that such damages are remote, uncertain, and not within contemplation of the parties at the time, and not an element of actual damages in the case, and, under the allegations of the petition, not recoverable at all.

(2) That, in so far as plaintiff seeks a recovery for damages therein for alleged mental distress, said petition is insufficient, in this: that the amount claimed is and was below the jurisdiction of the Circuit Court.

The defendant also filed a general denial or general traverse of the allegations of the petition, and a special plea setting up the contributory negligence of the plaintiff; also, a special plea setting up the special rules and regulations of the defendant, governing the sending of messages, under which it only undertook to make free delivery, in towns the size of Gatesville, within a radius of half a mile of its office, and averred that the plaintiff did not, at the time said message was received, nor at any time, reside within half a mile of said office, and that no arrangements were made, and no contract entered into, to make delivery of said message outside of said limits, and no extra compensation was ever paid or guaranteed for the special delivery of said message outside of said limits.

On the trial of the cause there was a verdict for the plaintiff in the sum of \$1,250, and judgment was entered thereon. The plaintiff in error thereupon brought the case to this court for review, assigning errors as follows: "First assignment of error: The court erred in overruling general demurrer of the defendant to plaintiff's petition, because said petition failed to show any cause of action, of which said court could have, hold, and maintain jurisdiction, all of which appears at large by inspection of said petition, and said demurrer thereto. Second assignment of error: The court erred in overruling the first special exception and demurrer of defendant to plaintiff's said petition. Third assignment of error: The court erred in overruling the second special exception of defendant to

plaintiff's said petition. Fourth assignment of error: The court erred in overruling the third special exception of defendant to plaintiff's said petition. Fifth assignment of error: The court erred in overruling the fourth special exception of defendant to plaintiff's petition."

George Denegre, Walter D. Denegre, T. L. Bayne, Gaylord B. & Frank B. Clark, Jr., and M. A. Spoons (George H. Fearons, Stanley, Spoons & Meek, and E. R. Meek, on the brief), for plaintiff in error.

S. B. Hawkins, John Clegg, and E. A. McDonald (McDowell, Milker & Hawkins, White & Taylor, and Clegg & Thorpe, on the brief), for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge (after stating the facts as above): The right of the defendant in error, plaintiff in the court below, to recover damages in this action must be based upon the contract entered into with the Western Union Telegraph Company to transmit and deliver the message in question; and this whether the action is one technically for damages for breach of contract, or is an action sounding in tort. The facts, as narrated in the first original amended petition, show that one G. W. Wood, a brother of defendant in error, residing in Jefferson, Marion county, Tex., became very ill, and desiring the presence of the defendant in error, to comfort him in his last illness, and to settle important business matters, procured a telegram to be sent to his son, John A. Wood, who resided in McGregor, McLennan county, Tex., therein requesting the presence of his said son, and requesting said son to notify his brother, defendant in error, of his said illness. John A. Wood thereupon delivered to the agent of the telegraph company, for transmission and delivery, the following message:

Telegraph Co. v. Wood.

To A. Wood, Gatesville, Texas: Received telegram. Pa is very low.
Asked to wire you.

[Signed]

JOHN A. WOOD.

The person referred to as "Pa," in said telegram, was the said G. W. Wood. At the time the said message was delivered to the telegraph company's agent for transmission and delivery, the price demanded for sending the same was paid by said John A. Wood. It is not shown that the defendant in error was a party to, or privy to, the contract thus entered into, nor does it even appear that the contract was entered into for the benefit of the defendant in error. On the contrary, so far as the telegraph company had notice, it was for the benefit of G. W. Wood. We notice in the petition the statement, "the said John A. Wood, in response to his father's telegram, and as the agent and acting for plaintiff, delivered to the agent of defendant," etc., but we consider all that is said with reference to John A. Wood's being the agent and acting for the defendant in error as a statement of a conclusion of law, rather than of fact, and as entirely refuted by the detailed facts set forth in the petition itself. The action being founded upon a contract, the elementary rule is that no one can sue for damages thereon who is not a party to the contract.

"This rule is often expressed in the maxim that no one can sue on a contract 'who is a stranger to the contract, or who is not privy to it.' In whatever words expressed, it embodies the principle that 'Rights founded on contract belong to the person who has stipulated for them,' and no other, and, therefore, that no one can sue for the non-performance of an agreement to which he was not, either directly or through his agent, a party. * * * It is, in short, 'clear that an action of contract cannot be maintained by a person who is not a party to the contract; and the same principle extends to an action of tort arising out of the contract. No one, therefore, can bring an action for a breach of contract merely because he thereby suffers loss or damage, since a person may be damaged by the breach of a contract to which he is not a party, and under which,

therefore, he has no rights. The loss he suffers, in so far, of course, as it arises merely from the breach of the contract, is *damnum absque injuria*, and affords no cause of action." Dicey, Parties, marg. pp. 77, 79 ; 3 Bouv. Inst. p. 134.

We can see no reason why suits brought on contract for the transmission of messages by telegraph, and where the damages claimed are wholly based on nonfeasance, should be excepted from the general rule. There seems to be still less reason to make an exception where the case further shows that the damages claimed for nonfeasance are unaccompanied by injury to the person or purse.

In *Playford v. Telegraph Co.*, L. R. 4 Q. B. 706, where the plaintiff sued for damages for the erroneous transmission of a message by telegraph, sent to him by merchants from whom he had asked an offer for ice, it was held that the defendant's liability arose only from contract. As Sir Robert Lush, delivering the opinion of the court, said :

"The only question, therefore, is, with whom was the contract made? And to this there can be but one answer: It was made with Messrs. Rice & Hellyer. The offer was sent by them on their own behalf, and in their own interest. In so doing they acted, it is true, on the invitation of the plaintiff, but not as his agents, or as representing him. * * * It follows that the plaintiff, who is a stranger to the contract with the company, cannot maintain an action against them for the breach of it."

In the case of *Railway Co. v. Levy*, 59 Tex. 563, a father sued a railway company, which owned and operated a telegraph line, for negligence in failing to transmit a message sent to him by his son, informing him of the sudden death of his son's wife and child. It was held that the contract between the son and the company could not be made a basis of recovery by the father. In delivering the opinion of the court, Mr. Justice STAYTON said :

"The English cases hold, substantially, that a person to whom a message is sent cannot maintain an action, notwithstanding pecuniary injury may result to him by the failure

of a telegraph company correctly, or within a reasonable time, to transmit it, unless the sender sustains to the person to whom the message is sent the relation of agent, through which privity of contract is established. *Playford v. Telegraph Co.*, L. R. 4 Q. B. 706. This doctrine has not been accepted by the courts of this country, but none of them have gone to the extent of holding that the person to whom the message is sent may maintain an action for the negligence of a telegraph company in transmitting, without averment and proof of some actual pecuniary injury sustained thereby."

In *Elliot v. Telegraph Co.*, 75 Tex. 18 (12 S. W. Rep. 954), the plaintiffs were operating a sawmill, and, having broken their saw, one of the firm went to a neighboring village, and engaged Stewart, a member of a mercantile firm, to telegraph to St. Louis to parties to ship at once another saw for use in the mill. A dispatch was prepared, but was handed to a traveling agent of the hardware firm to whom it was addressed. The agent did not send the dispatch, but sent another, in terms, "Express Galloway and Stewart one Disston circular rip saw, fifty-six inches, terms regular," signing it himself. It was not made known to the agent of the telegraph company that the order was in behalf of plaintiffs, and the court held that no recovery could be had by plaintiffs against the telegraph company for damages for want of the saw, or for the failure to deliver the dispatch. In delivering the opinion of the court, Mr. Justice GAINES said:

"It appears that, in delivering the dispatch written by himself, McAllen was not acting under the authority given him by Stewart, which was to cause to be transmitted the message written by the latter. Being the agent of the company who was addressed, he probably deemed it best to make the order himself. * * * At all events, he was not authorized to send that dispatch for Stewart, and it was not, therefore, the dispatch of plaintiff, though intended for his benefit. In the case of *Telegraph Co. v. Broesche*, 72 Tex. 654 (10 S. W. Rep. 734), the person who delivered the

message for transmission was authorized to do so by the plaintiff, who was immediately present when it was delivered. The damages claimed were for the loss accruing by reason of plaintiff's mill lying idle for want of the saw. The face of the message did not advise the defendant that it was intended for the benefit of plaintiffs, or that such persons existed, and there was no evidence that defendant's agent knew the fact that the mill was idle for want of the saw. Therefore, plaintiffs could not have recovered damages for the loss resulting from this source. If they had proved that the message written by Stewart was delivered to the agent, they could, under the evidence, have recovered only the money paid for its transmission."

Again, in *Telegraph Co. v. Young*, 77 Tex. 245 (18 S.W. Rep. 985), it was held that "the liability of a telegraph company regarding the delivery of a message must be determined by the character of its contract."

We have examined the Texas cases cited by the appellee, where the person to whom a telegraphic message was directed has been permitted to maintain an action for the recovery of damages against a telegraph company for negligence in the transmission or delivery of the message; but we do not find in any of them that the *Case of Levy*, 59 Tex. 563, has been overruled, or even doubted, but that in each case, in the opinion of the court, the circumstances showed the party suing had either himself procured the sending of the message, and, therefore, was privy to the contract, or was, to the knowledge of the telegraph company, the party for whose benefit the message was intended.

In the present case, as we have seen, the plaintiff himself neither procured the dispatch to be sent, nor paid the consideration, nor was the telegraph company informed, either in terms, or by the tenor of the dispatch, that it was for his benefit, but was informed, so far as the message itself read, that it was sent at the request, and for the benefit, of another party. In our opinion the general exception and demurrer to the first amended original petition should have been sustained. Besides demurring generally, the defendant in the

court below, plaintiff in error here, specially excepted and demurred to so much of the first amended original petition as sets forth a right to recover damages for alleged mental suffering and distress, upon the ground that such damages are remote, uncertain, and not within the contemplation of the parties at the time, and not an element of actual damages in the case, and, under the allegations of the petition, are not recoverable. The overruling of this special demurrer is assigned as error, and it presents the question which has been mainly considered in the argument of this case.

Defendant in error contends "that mental anguish, unaccompanied by injury to person or purse, is actual damage, and may be recovered as such." He supports his contention with a line of decisions rendered in the Supreme Courts of Kentucky, Tennessee, Alabama, North Carolina, Indiana, generally following the Texas decisions, and with quotations as to the law on the subject from several text writers of reputation. *Telegraph Co. v. Adams*, 75 Tex. 536 (12 S. W. Rep. 857); *Anderson v. Telegraph Co.* (Tex. Sup.), 19 S. W. Rep. 285; *Martin v. Telegraph Co.* (Tex. Civ. App.), 20 S. W. Rep. 861; *Telegraph Co. v. Longwill* (N. M.), 21 Pac. Rep. 339; *Telegraph Co. v. Allen*, 66 Miss. 549 (6 South. Rep. 461); *Telegraph Co. v. Dubois*, 128 Ill. 248 (21 N. E. Rep. 4); *Young v. Telegraph Co.*, 107 N. C. 370 (11 S. E. Rep. 1044); *Chapman v. Telegraph Co.* (Ky.), 13 S. W. Rep. 880; *Wadsworth v. Telegraph Co.*, 86 Tenn. 695 (8 S. W. Rep. 574); *Telegraph Co. v. Dryburg*, 85 Pa. St. 298; *Reese v. Telegraph Co.*, 123 Ind. 294 (24 N. E. Rep. 163); Shear. & R. Neg. § 560; Gray, Com. Tel. 65 *et seq.*; Thomp. Elect. § 424 *et seq.*; 3 Suth. Dam. 314; 2 Thomp. Neg. 847, § 11; 5 Lawson Rights, Rem. & Pr. § 1972; *Telegraph Co. v. Beringer*, 84 Tex. 38 (19 S. W. Rep. 336); *Telegraph Co. v. Jones*, 81 Tex. 271 (16 S. W. Rep. 1006); *Telegraph Co. v. Moore*, 76 Tex. 67 (12 S. W. Rep. 949); *Telegraph Co. v. Edsall*, 74 Tex. 333 (12 S. W. Rep. 41); *Telegraph Co. v. Feegles*, 75 Tex. 537 (12 S. W. Rep. 860); *Potts v. Telegraph Co.*, 82 Tex. 545 (18 S. W. Rep. 604); *Telegraph Co. v. Ward* (Tex. App.) 19 S. W. Rep.

898); *Telegraph Co. v. Rosentreter*, 80 Tex. 408 (16 S. W. Rep. 29); *Telegraph Co. v. Nations*, 82 Tex. 89 (18 S. W. Rep. 709).

A careful reading of the cases cited will show that, in the main, they do not declare the general proposition applicable to all cases, that mental anguish resulting from the breach of a contract, or even from the neglect of a duty, unaccompanied with actual injury to the person or purse, will support an action for damages; but they rather make an exception as against corporations and *quasi* public agencies, which, from the character of their business as common carriers, or in the nature thereof, and from the public privileges enjoyed, are said to be charged with a public duty, as well as obligated to particular individuals under special contracts. The logic seems to be that, as they are charged with duties to the public, they may be held liable for mental anguish, unaccompanied with other injury, resulting from the breach of the contract; and this, not exactly as punitive damages or smart money, but rather as a case where damages should be allowed to the aggrieved individual in order to impress upon the defendant the great importance of faithfully performing his duty to the public. We do not refer to this for the purpose of criticising the argument, but rather to suggest that telegraph companies, and other *quasi* public agencies referred to, are engaged in commerce, (*W. U. Tel. Co. v. Texas*, 105 U. S. 460); that their rights, duties and obligations under contracts in the line of their business are matters arising under the general law; and that in the courts of the United States the questions arising thereunder, in the absence of controlling statutes, are not controlled by the decisions of the courts of last resort of any particular State in reference to like matters, although the cause of action originated in said State. *Railway Co. v. Prentice*, 147 U. S. 105 (13 Sup. Ct. Rep. 261); *Railroad Co. v. Baugh*, 13 Sup. Ct. Rep. 914, recently decided, not yet officially reported.

The general rule that mental anguish and suffering, untended by any injury to the person, resulting from simple

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a telegraph company for mental anguish resulting from simple negligence in the prompt delivery of a telegraphic message, as the same are too uncertain, remote, and speculative.

In the case of *Wadsworth v. Telegraph Co.*, *supra*, Judge LURTON, dissenting, said :

"The reason why an independent action for such injuries cannot and ought not to be sustained is found in the remoteness of such damages. * * * Such injuries are generally more sentimental than substantial, depending largely upon physical and nervous condition. The suffering of one under precisely the same circumstances would be no test of the suffering of another. Vague and shadowy, there is no possible standard by which such an injury can be justly compensated, or even approximately measured. Easily simulated, and impossible to disprove, it falls within all of the objections to speculative damages, which are universally excluded because of their uncertain character. That damages so imaginary, so metaphysical, so sentimental, shall be ascertained and assessed by a jury with justness, not by way of punishment to the defendant, but as mere compensation to the plaintiff, is not to be expected. That the grief natural to the death of a loved relative shall be separated from the added grief and anguish resulting from delayed information of such mortal illness and death, and compensation given for the latter only, is the task imposed by the law, as determined by the majority. But the rule in question has not been limited, as claimed, to actions based upon physical pain. It has, as we have already seen, upon the authority of Mr. Wood, been applied to actions of slander and libel. No matter how gross the insult, or how harrowing to the feelings, there can be no recovery if the slander did not imply a crime or result in some special damage. The same rule applies in actions brought for the death of another. The plaintiff must have a pecuniary interest in such life ; and in such cases there can be no recovery for the injured feelings, the grief, or anguish suffered by the plaintiff in consequence of the

death for which the suit lies. This is the rule, regardless of the relation the deceased bore to the plaintiff. Whether husband or wife, or parent or child, the rule is the same. The damages are for the pecuniary loss sustained. * * * The principles upon which this suit is maintained seem to me so radical a departure from the headlands of the law, and to so seriously threaten the uprooting of doctrines that I have been taught to revere as the very foundation stones of the system of our law, upon the subject of contracts and damages, as to make it my duty to give expression to my views upon the questions involved."

In the well considered case of *Telegraph Co. v. Rogers*, *supra*, Mr. Justice COOPER, after ably reviewing the adjudged cases, said, for the Supreme Court of Mississippi:

"We are not disposed to depart from what we consider the old and settled principles of law, nor to follow the few courts in which the new rule has been announced. The difficulty of applying any measure of damages for bodily injury is universally recognized and commented on by the courts. But in that class of cases demands for simulated or imaginary injuries are far less likely to be made than will be those in suits for mental pain alone. No one but the plaintiff can know whether he really suffers any mental disturbance, and its extent and severity must depend upon his own mental peculiarity. In the nature of things, money can neither palliate nor compensate the injury he has sustained. 'Mental pain and anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone.' *Lynch v. Knight*, 9 H. L. Cas. 577. The rapid multiplication of cases of this character in the State of Texas since the case of *So Relle* indicates to some extent the field of speculative litigation opened up by that decision. The course of decision shows how difficult the subject is of control. In *So Relle's case* it was held that the sendee of the undelivered message, who had paid nothing for its transmission, might recover for the mental suffering flowing from its non-delivery. In *Railroad Co. v. Levy*, 59 Tex. 564, that case was over-

ruled in so far as the right of action was recognized in the sendee, and it was held that only the person entering into the contract with the company might sue. But in *Telegraph Co. v. Cooper*, 71 Tex. 507 (9 S. W. Rep. 593), where the husband had sent the dispatch calling a physician to attend his wife in her confinement, it was held that the husband (the sender of the message) could not recover for his mental sufferings, caused by the negligence of the company in failing to deliver the message, but that, suing in right of his wife (who was not a party to the contract with the company), he might recover for her mental suffering. It is held in that State that the telegraph company must be informed, either by the face of the message, or by extraneous notice, of the relationship of the parties, and the purport of the message, to warrant the recovery of damages for mental suffering. It has been decided that this dispatch did not sufficiently indicate these facts: 'Willie died yesterday at six o'clock. Will be buried at Marshall Sunday evening.' (*Telegraph Co. v. Brown*, 71 Tex. 723, 10 S. W. Rep. 323), while the following one did: 'Billie is very low. Come at once,' (*Telegraph Co. v. Moore*, 76 Tex. 66, 12 S. W. Rep. 949). And a distinction seems to be drawn between the negligence of failing to deliver a dispatch which causes mental pain and suffering, and failing to deliver one which if delivered would relieve such suffering. In *Rowell v. Telegraph Co.*, 75 Tex. 26, 12 S. W. Rep. 534, the plaintiff and his wife had received information of the dangerous illness of her mother. Subsequently, a dispatch was sent, containing information of the mother's improved condition. This dispatch the company failed to deliver. Suit was brought, but recovery was denied, the court saying: 'The demurrer was properly sustained. The damage here complained of was the mere continued anxiety caused by the failure promptly to deliver the message. Some kind of unpleasant emotion in the mind of the injured party is probably the result of a breach of contract, in most cases. But the cases are rare in which such emotion can be held to be an element of the damages resulting

Telegraph Co. v. Wood.

from the breach. For injury to feelings, in such cases, the courts cannot give redress. Any other rule would result in intolerable litigation.' The manifest effect of this decision is to deny to a party injured redress for mental suffering contemplated by the parties to the contract as the probable consequence of its breach. The distinction drawn by the court is so unsubstantial that it was evidently resorted to for the purpose of obstructing the tide of 'intolerable litigation' flowing from the decisions following the *So Relle* case. Kentucky, Tennessee, Indiana and Alabama have but recently established the rule, the dangers and difficulties of which are becoming apparent in Texas. The 'intolerable litigation' invited and appearing in Texas has not yet fairly commenced in those States. It will, however, appear in due time, and the courts will be forced to resort to refined limitations, as Texas has done, to restrict it. We prefer the safety afforded by the conservation of the old law, as we understand it to be, and are of the opinion that no recovery for mental suffering can be had under the circumstances of this case."

With the reasoning and conclusions of these two eminent judges, we fully concur. The judgment of the Circuit Court should therefore be reversed, and the case remanded, with instructions to enter judgment for the defendant, sustaining the general demurrer and the first special demurrer to the plaintiff's first amended original petition, and dismissing plaintiff's suit, with costs, and it is so ordered.

NOTE.—This case is cited in *Summerfield v. W. U. Tel. Co.*, ante, p. 838.

MICHAEL GAHAN V. WESTERN UNION TELEGRAPH COMPANY.*U. S. Circuit Court, Dist. Minnesota, Jan. 2, 1894.*

(59 Fed. Rep. 433.)

FAILURE TO DELIVER TELEGRAM.—MINNESOTA STATUTE.—MENTAL DISTRESS.

Neither under the Minnesota statute, which limits the recovery against a telegraph company for error, delay, &c., in the transmission of telegrams, nor at common law, can the addressee of a telegram recover damages for mental distress caused by mere negligent failure of the company to deliver a telegram presented by his agent for delivery to him.

Case of this series cited in opinion: *Young v. W. U. Tel. Co.*, vol. 8, p. 784.

VERDICT directed for defendant.

Statement by WILLIAMS, District Judge.

Plaintiff's brother, Thomas Gahan, on January 14, 1891, filed at Chicago, Ill., for transmission to plaintiff, at South St. Paul, Minn., paying the tolls thereon, the following message.

CHICAGO, January 14, 1891.

To Michael Gahan, South St. Paul: Your brother Wm. Gahan is dead. Come at once. Will be buried Friday.

[Signed],

THOMAS GAHAN.

The message was transmitted to St. Paul, and there lost, in some way not explained, and not forwarded to its destination, and plaintiff was therefore not apprised of the death of his brother until some days after his burial. Plaintiff brings this action to recover damages for mental anguish suffered on account of the negligent failure to deliver the message. The action is *ex contractu*, the complaint alleging that Thomas Gahan, who sent the message and paid the tolls—forty cents—did so as the agent of plaintiff. Defendant objected to the introduction of evi-

dence as to mental anguish, and, at the close of the case, moved for an instruction to the jury to return a verdict for defendant.

Jos. A. Schroll, for plaintiff.

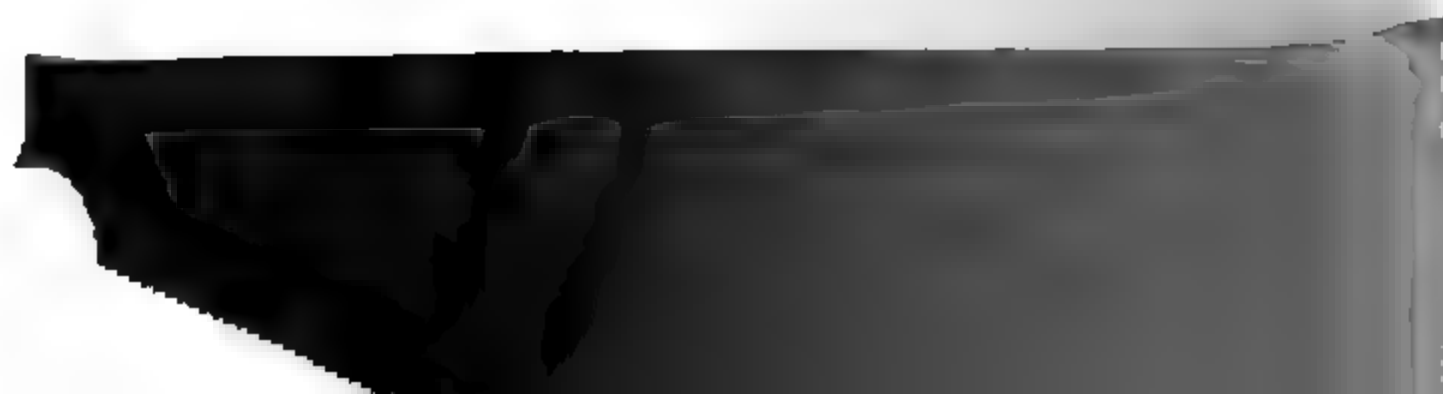
C. M. Ferguson, for defendant.

WILLIAMS, District Judge (after stating the facts): The case is somewhat new, and yet it has been pretty well adjudicated, and outside of the decision of Judge MAXEY, *Beasley v. Telegraph Co.*, 39 Fed. R. 181, every time it has been touched by the Federal courts it has been clearly and unequivocally held that the action cannot be maintained. The State courts have pretty generally passed upon the question, and, outside of the cases cited by counsel for plaintiff, I do not think you will find another State court that upholds that doctrine. A large majority of the State courts have held that the action cannot be maintained, and that no recovery can be had. Counsel has read from the Carolina report, *Young v. Telegraph Co.*, 107 N. C. 370 (11 S. E. 1044), and I think that is the strongest the case can be put; and that is very much in consonance with the sentiment which must arise, to a large extent, in the breasts of all men; but, when you come to analyze it, I think the best you can say is that this sentiment has carried away the better judgment of the court. There is nothing to maintain it, and it is not, as a principle of law, sound in any respect. Furthermore, the statute of Minnesota is clear and unequivocal, and under it no action can be maintained except for actual damages. The term "actual damages" has a significance and meaning of its own, and any attempt to reason a claim of this kind into actual damages certainly must fail. This court holds, in accordance with the position taken by defendant, that the action cannot be maintained. Counsel has stated that it is agreed that plaintiff disclaims anything on the ground of any wilful or malicious disregard of the rights of plaintiff, and seeks to

recover entirely upon the ground of negligence in the performance of the contract. There is a claim that fifty cents was expended in searching for this telegram, but I think that is too remote. There is another claim of forty cents for sending the telegram, but counsel for plaintiff says he makes no claim for that.

Let the record be fairly made up, showing that counsel for plaintiff expressly disclaims anything on the ground of any wilful and malicious disregard of the rights of plaintiff, and asks the recovery simply on the ground of negligence on the part of the defendant company in the non-delivery of the telegram, thereby causing plaintiff to suffer great mental anguish, and that the court then directed the jury to find a verdict for the defendant. Ordered accordingly.

NOTE.—The case of *Fleischner v. Pacific Postal Tel. Cable Co.*, U. S. Circuit Court, Dist. Oregon, Dec. 21, 1893 (55 Fed. Rep. 788), was reviewed and reversed in part by the Circuit Court of Appeals, reported 66 Fed. R. 892. The opinion of the Appellate Court will be reported in vol. 8.



GENERAL NOTE.

Memoranda of cases not selected for re-printing in full, and not previously mentioned in notes. Georgia Telegraph Statute.

ELECTRIC LIGHT COMPANY.—CERTIFICATE OF INCORPORATION.

The People, ex rel. The Municipal Gas Company of Albany, v. Frank Rice, as Secretary of State, &c. New York Court of Appeals, April 18, 1893. (138 N. Y. 151.)

In this case a company which had been incorporated as a gas company, desired to extend its operations to the production of electric light, heat and power; and to that end it proposed to file an amended certificate embracing all said purposes. The Secretary of State refused to file the certificate, upon the ground that a single corporation could not produce both gas and electricity, and it was here sought by mandamus to compel such filing. The decision involved the construction of various statutes. A writ of peremptory mandamus was awarded the petitioner.

ELECTRIC LIGHT COMPANY.—MUNICIPAL CONTRACT AND FRANCHISE.

Newport v. Newport Light Company. Kentucky Court of Appeals, Jan. 26, 1890. (89 Ky. 454.)

Charter power to a company authorizing it to furnish any city with gas "or other light," empowers a city having general power to contract, to contract with said company to furnish electric light. Such a contract granting to a company the exclusive use of the streets for a term of years for maintenance of gas pipes, although providing for the adoption of other means of lighting, does not authorize the erection of electric light appliances, but for that a new consent must be obtained.

An appeal was taken from this decision to the Supreme Court of the United States (*Newport Light Co. v. Newport*, Feb. 5, 1894, 151 U. S. 537), where it was held that no Federal question was presented which conferred jurisdiction on the court.

City of Keokuk v. Ft. Wayne Electric Light Company. Iowa Supreme Court, Jan. 30, 1894. (37 N. W. 689.)

Iowa Code, section 471, which requires that all ordinances authorizing the erection of electric light plants shall be submitted to popular vote, applies to an ordinance granting a franchise to maintain poles and wires for lighting in the streets.

ELECTRIC LIGHT COMPANY.—TAXATION.

People, ex rel. Edison Electric Light Co. v. Frank Campbell. New York Court of Appeals, June 29, 1893. (138 N. Y. 543.)

for an injunction. The court held that the receiver would be protected in the possession, use and management of the property and franchises committed to him; that so far as the use proposed to be made by the defendant of the roadbed or track of the company in the hands of the receiver obstructed, hindered or embarrassed his use, it should be prohibited; that an injunction should be granted restraining the defendant from interfering with the right of way and roadbed of the road in possession of the receiver; but that the erection of poles and wires, as proposed by the defendant, would not be such interference.

GEORGIA TELEGRAPH STATUTE.—LAWS 1887, No. 365, AS AMENDED BY LAWS 1892, No. 98.

Section 1. Every electric telegraph company, with a line of wires wholly or partly in this State, and engaged in telegraphing for the public, shall during the usual office hours receive dispatches, whether from other telegraphic lines or from individuals, and on payment or tender of the usual charges according to the regulations of such company, shall transmit and deliver the same with impartiality and good faith and with due diligence, under penalty of fifty dollars, which penalty may be recovered by suit in a court having jurisdiction thereof, by either the sender of the dispatch or the person to whom sent or directed, whichever may first sue; provided, that nothing herein shall be construed as impairing or in any way modifying the right of any person to recover any damages for any such breach of contract or duty by any telegraph company, and said penalty and said damages may, if the party so elect, be recovered in the same suit.

Section 2. Such companies must deliver all dispatches to the persons to whom the same are addressed, or to their agents, on payment of any charges due for the same, provided such persons or agents reside within one mile of the telegraphic station, or within the city or town in which such station is, or if not residing in said limits, that the sender of the dispatch specify in the dispatch the place at which, in said limits, the said dispatch is to be delivered.

Section 3. In all cases the liability of said company for messages in cipher, in whole or in part, shall be the same as if the same were not in cipher.

The foregoing is the statute under which the Georgia telegraph negligence cases in this volume were decided. It was, however, repealed in 1894, Laws, No. 96.



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Fact of non-residence of addressee within city or within a mile of terminal office will not exempt company from penalty for failure to deliver to addressee when he called for message at terminal office.

Western Union Tel. Co. v. Mansfield (Ga.)..... 706, note.

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Fact that servants of telephone company let wire fall in street, by which horse frightened and driver thrown from wagon, held *prima facie* proof of negligence.

Arkansas Teleph. Co. v. Ratteree (Ark.)..... 401, note.

Action for injuries caused by owner of building cutting guy wires attached thereto and causing fall of telephone pole and consequent injuries. Held that evidence did not require finding that fall of pole was due to manner in which guy wires removed.

Johnson v. N. W. Teleph. Exch. Co. (Minn.) 401, note.

Injury caused by falling upon telegraph pole lying in highway. Judgment for plaintiff affirmed.

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Interference of electrical currents; induction and conduction. (See NOTES, pp. 296, 320.)

Injunction held improperly dissolved upon denial in answer to complaint of one electric light company in action for permanent injunction restraining company subsequently in streets from so maintaining its appliances as to interfere with those of plaintiff.

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In similar case complainant held entitled to perpetual injunction.

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Temporary injunction to restrain interference of electric railway with telephone system denied as to conduction and induction, upon defendant giving security for payment of damages which might be awarded; but granted as to actual contact of wires, it appearing that it could prevent same by guard wires.

Central Pa. Teleph. & Supply Co. v. Wilkesbath, & Co. Ry. Co. (Pa.) 396

Injunction at suit of telephone company to restrain electric railway company from interference by conduction and induction held improper, upon the ground that latter being proper street use has the preference.

Hudson River Teleph. Co. v. Watervliet, T. & R. R. Co. (N. Y.) 395

Mandamus granted at suit of telephone company to compel electric railway company, later in field, to protect telephone line by guard wires.

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Telephone company having adopted measures to protect its system against interference by electric street railway, allowed to recover expense thereof as to conduction and contact of wires, but not as to induction: induction being incident to the use of streets, as to which railway has preference, but conduction and conflict of wires being due to fault of railway company.

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Based on number of poles and length of wires may be required of telegraph company using streets. Amount of fee discretionary, and courts will interfere only when discretion abused. One dollar per annum per pole and \$2.50 per mile of wire not unreasonable.

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Sender held bound by condition in blank, though message written on plain paper and copied upon blank at his request by operator.	
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Condition does not apply in action for statutory penalty, but does as to claims for special damages. It operates against addressee as well as sender, if message related to business of both parties, and was in reply to one from addressee. Western Union Tel. Co. v. James.....	705, note.
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Mental distress alone held to warrant recovery. (At suit of sender.)

Western Union Tel. Co. v. Beringer (Tex.)..... 806, note.
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Western Union Tel. Co. v. Newhouse (Ind.)..... 781, note.

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Tyler v. W. U. Tel. Co. (U. S.)..... 821

Not basis for recovery of special damages where plaintiff suffered nothing but suspense of mind by delay of telegram from consulting physician, who in fact could not obey the summonens.

Western Union Tel. Co. v. Parks (Tex.)..... 819, note.

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Western Union Tel. Co. v. Stratemeier (Ind.).... 730, note.

Not proper element, where company not reasonably presumed to have contemplated such result.

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Though addressee cannot recover in absence of contractual relation, such relation exists where message is in reply to one of inquiry.

Western Union Telegraph Co. v. Cunningham (Ala.) 858

Jury can estimate damages for, from their own knowledge and experience, without evidence.

Western Union Tel. Co. v. McLeod (Tex.)..... 811, note.

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Does not admit recovery of damages for mental distress alone.

Gahan v. W. U. Tel. Co. (U. S.)..... 855

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Penalty may be recovered in every case where there is obligation and default.

Western Union Tel. Co. v. Jones (Miss.)..... 730

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State, ex rel. Wisconsin Teleph. Co. v. Janesville St. Ry. Co. (Wis.).....	239
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Hersheyfield v. Rocky Mt. Bell Teleph. Co. (Mont.).....	73
To compel removal of electric light poles to conform to changed curb-lines is within police power, and courts will not review municipal action in absence of fraud, corruption or oppression.	
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Authorities must exercise control with care, and if permission to extend trolley-line over bridge be granted without inquiry as to strength of bridge to carry electric cars, courts will interfere by certiorari.	
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Municipal resolution, granting permission for one electric light company to use poles of another in streets, void unless attended with proper regulations for protection of owners of poles, of employees of both companies, and of the public.	
Citizens' Elec. Lt. & Power Co. v. Sands (Mich.).....	53
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Authority to permit use of other than animal power for street railway includes authority to permit overhead electric trolley system.	
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Ordinance lawfully enacted, designating certain streets for use by street railway company, provided that use of company's tracks might be subsequently granted to	

others. Held, that such permission might be granted for electric railway, though such motive power unknown when ordinance enacted.

North Baltimore Pass. Ry. Co. v. No. Av. Ry. Co.
(Md.) 1

Municipal corporation having contracted with electric light company for lighting its streets, and company in reliance thereon having expended money and placed its line with municipal consent and direction, cannot infringe the company's rights or permit another company to infringe them.

Rutland Elec. Lt. Co. v. Marble City Elec. Lt. Co.
(Vt.) 256

Municipal authorities having granted permission to company and its assigns to maintain poles and wires in streets restrained by injunction from cutting wire of licensee of said company.

Newman v. Avondale (Ohio) 33

Consent of municipal authorities of Newark to electric street railway to place poles and wires in streets, being a street regulation, must be given by ordinance, not by resolution.

State, Halsey Pres. v. Newark (N. J.) 46

City of New Orleans authorized by statute to permit one street railway to use tracks of another, using different motor.

Canal, &c. R. Co. v. Crescent City R. Co. et al.
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Statute requiring that all ordinances authorizing erection of electric light plants shall be submitted to popular vote applies to ordinance granting franchise to maintain poles and wires in streets.

Keokuk v. Ft. Wayne Electric Lt. Co. (Iowa) ... 359, note.

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Company held liable for both statutory penalty and special damages, whether or not work of necessity, where message received on Sunday was intended to summon an attorney to appear in court Monday morning and was not delivered until Monday evening.

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Message from son to his mother, announcing expected arrival of friend, is not a work of necessity or charity.

Western Union Tel. Co. v. Hutcheson (Ga.) 706, note.

Pleading held demurrable, for not showing that telegram related to work of necessity or charity.

Willingham v. W. U. Tel. Co. (Ga.) 706, note.

Advantage of fact that contract made on Sunday must be taken by answer, not by demurrer.

Western Union Tel. Co. v. Eskridge (Ind.)..... 780, note.

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Barnett v. W. U. Tel. Co. (Mo.)..... 780, note.

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Cent. Pa. Teleph. & Supply Co. v. Wilkesbarre, &c.
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